Supreme Court, U.S.
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No. ~~OFFICE OF THE CLERK~~

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT WORKMAN,

Petitioner,

v.

SHERIFF ED JORDAN, in his individual capacity, and UNDERSHERIFF RICK DILL, in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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91 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a governmental employee's sworn, truthful testimony at a quasi-judicial, administrative hearing is inherently a matter of public concern subject to the protection of the First Amendment?

2. Whether, pursuant to a two year statute of limitations (Colo. Rev. Stat. § 13-80-102), a First Amendment claim is time barred where the allegations of the complaint, filed in November 1990, state as the basis for such claim the discharge of a governmental employee in November 1989 in retaliation for the employee's sworn, truthful testimony at a state administrative hearing two and one-half years prior to the discharge?

LIST OF PARTIES

Judy Workman, the wife of Petitioner Robert Workman and a plaintiff in the trial court, was listed in the caption of the Tenth Circuit opinion as a "Plaintiff-Appellee and Cross-Appellant." However, because her only claim in the case is a derivative state law claim and the appeal to the Tenth Circuit involved only Robert's constitutional claims against Respondents Jordan and Dill in their individual capacities, Judy Workman was not truly a party to the court of appeals opinion which is the subject of this petition for a writ of certiorari. She continues to retain an interest in her state tort claim.

Sheriff Ed Jordan, in his **official** capacity; and Undersheriff Rick Dill, in his **official** capacity, were erroneously listed as "Defendants-Appellants, Cross-Appellees" in the Tenth Circuit opinion. Jordan and Dill were parties to the appeal in their **individual** capacities only. Captain Michael Miller, in his official capacity; David Worden, in his individual and official capacities; and Weld County, by and through the Board of County Commissioners of the County of Weld, were listed in the Tenth Circuit opinion as "Defendants." None of these persons and entities were parties in the court of appeals with respect to the opinion sought to be reviewed in the Supreme Court. Robert and Judy Workman retain other claims against these parties, and some of those claims are currently the subject of a separate appeal in the Tenth Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ii

LIST OF PARTIES iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

I. FACTUAL BACKGROUND OF CASE . 3

II. THE PROCEEDINGS IN THE DISTRICT COURT 6

III. THE COURT OF APPEALS' DECISION 8

REASONS FOR GRANTING THE WRIT 9

I. INTRODUCTION 9

II. THE TENTH CIRCUIT'S HOLDING HAS CREATED A CONFLICT WITH THE LAW OF THE FIFTH CIRCUIT . 10

III. BECAUSE THE TENTH CIRCUIT'S RULING ON THIS CONSTITUTIONAL QUESTION THREATENS THE INTEGRITY OF THE JUDICIAL SYSTEM, THIS COURT SHOULD REVIEW THAT DECISION 15

IV. THE TENTH CIRCUIT ERRED IN HOLDING THAT PART OF PETITIONER'S FIRST AMENDMENT CLAIM WAS TIME BARRED 19

V. THE TENTH CIRCUIT'S FIRST AMENDMENT HOLDING SUBJECTS WORKMAN TO THE INJUSTICE OF EMPLOYER RETALIATION AS A CONSEQUENCE OF PROVIDING TRUTHFUL TESTIMONY UNDER OATH 21

CONCLUSION 24

APPENDIX "A" - Excerpts from supplemented complaint 1a

APPENDIX "B" - February 12, 1991 order of district court, re: motions to dismiss 6a

APPENDIX "C" - March 16, 1992 decision of Tenth Circuit, re: district court's obligation to make a determination on qualified immunity defense 8a

APPENDIX "D" - April 7, 1993 order of district court, re: qualified immunity defenses 21a

APPENDIX "E" - Direction for entry of judgment on First Amendment claim . . 28a

APPENDIX "F" - Entry of judgment on First Amendment claim 30a

APPENDIX "G" - August 16, 1994 opinion of Tenth Circut dismissing constitutional claims against Respondents 32a

APPENDIX "H" - October 11, 1994 order of Tenth Circuit, denying petition for rehearing 52a

APPENDIX "I" - October 17, 1994 order of Tenth Circuit, denying petition for rehearing and suggestion for rehearing in banc 54a

APPENDIX "J" - Text of constitutional amendments and statutes involved 56a

TABLE OF AUTHORITIES

Cases

Arvinger v. Mayor & City Council of Baltimore,
862 F.2d 75 (4th Cir. 1988) 14
Connick v. Myers,
461 U.S. 138, 103 S. Ct. 1684,
75 L. Ed. 2d 708 (1983) 10, 11
Czurlanis v. Albanese,
721 F.2d 98 (3d Cir. 1983) 13
Freeman v. McKellar,
795 F. Supp. 733 (E.D. Pa. 1992) 14
Green v. City of Montgomery,
792 F. Supp. 1238 (M.D. Ala. 1992) . . . 14
Hansen v. Soldenwagner,
19 F.3d 573 (11th Cir. 1994) 14
Hunt v. Bennett,
17 F.3d 1263 (10th Cir.),
cert. denied, ___ U.S. ___,
115 S. Ct. 107, ___ L. Ed. 2d ___
(1994). 20
Johnston v. Harris County Flood Control Dist.,
869 F.2d 1565 (5th Cir. 1989),
cert. denied, 493 U.S. 1019,
110 S. Ct. 718, 107 L. Ed. 2d 738
(1990) 13, 16, 17
Langley v. Adams County,
987 F.2d 1473 (10th Cir. 1993) 11

Melton v. City of Okla. City,
879 F.2d 706 (10th Cir. 1989),
overruled in part on reh'g en banc,
928 F.2d 920 (10th Cir.), *cert. denied,*
___ U.S. ___, 112 S. Ct. 296,
116 L. Ed. 2d 241 (1991) 11, 21
Moore v. Floro,
614 F. Supp. 328 (N.D. Ill. 1985),
aff'd, 801 F.2d 1344 (7th Cir. 1986) . . . 14
Neubauer v. City of McAllen,
766 F.2d 1567 (5th Cir. 1985) 12, 15
Reeves v. Claiborne County Bd. of Educ.,
828 F.2d 1096
(5th Cir. 1987) 12, 13, 15, 16
Shotwell Mfg. v. United States,
371 U.S. 341, 83 S. Ct. 448,
9 L. Ed. 2d 357 (1963) 18
Smith v. Hightower,
693 F.2d 359 (5th Cir. 1982) . . 12, 15, 16
Ullmann v. United States,
350 U.S. 422, 76 S. Ct. 497,
100 L. Ed. 511 (1956) 21
United States v. Nixon,
418 U. S. 683, 94 S. Ct. 3090,
41 L. Ed. 2d 1039 18
Waters v. Churchill,
___, U.S. ___, 114 S. Ct. 1878,
128 L. Ed. 2d 686 (1994) 10, 11
Ziccarelli v. Leake,
767 F. Supp. 1450 (N.D. Ill. 1991) 14

Statutes

18 U.S.C. § 1621 21
28 U.S.C. § 1254 (1) 3
28 U.S.C. § 1331 6
28 U.S.C. § 1367 6
42 U.S.C. § 1983 . . . . . 3, 6, 8, 20
Colo. Rev. Stat. § 13-80-102 . . . . . ii, 3, 20

Constitutions

U.S. Const. amend. I . . . . . ii, passim

Rules

Fed. R. Civ. P. 54(b) 8
Fed. R. Evid. 102 17
Fed. R. Evid. 603 17
Sup. Ct. R. 10.1(a) 9
Sup. Ct. R. 10.1(c) 10

IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT WORKMAN,

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SHERIFF ED JORDAN, in his individual capacity, and UNDERSHERIFF RICK DILL, in his individual capacity,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Robert Workman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion to be reviewed (App. "G", *infra*, pp. 27a - 43a) is reported as *UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT, No. 93-*

1138 and 93-1178, ROBERT WORKMAN, JUDY WORKMAN, Plaintiffs-Appellees, Cross-Appellants, v. ED JORDAN, Sheriff, in his individual capacity; ED JORDAN, Sheriff, in his official capacity; RICK DILL, Undersheriff, in his individual capacity; RICK DILL, Undersheriff, in his official capacity, Defendants-Appellants, Cross-Appellees, and MICHAEL MILLER, Captain, in his official capacity; DAVID WORDEN, in his individual capacity; DAVID WORDEN, in his official capacity; WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendants, 32 F.3d 475 (10th Cir. 1994). The court of appeals order entered October 11, 1994, denying the petition for rehearing (App. "H", *infra*, pp. 44a - 45a) and the court of appeals order entered October 17, 1994, denying the petition for rehearing and the suggestion for rehearing in banc (App. "I", *infra*, pp. 46a - 47a) are not reported. A March 16, 1992 opinion of the Tenth Circuit (App. "C", *infra, pp. 7a - 17a)* is reported at 958 F.2d 332. The opinions of the district court entered on February 12, 1991 (App. "B", *infra*, pp. 5a - 6a), and April 7, 1993 (App. "D", *infra*, pp.18a - 23a), are not reported.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion on August 16, 1994 (App. "G", *infra,* pp. 27a - 43a). On October 11, 1994, the Tenth Circuit entered an order denying Petitioner's timely petition for rehearing; and on October 17, 1994, the Tenth Circuit entered another

order denying both Petitioner's petition for rehearing and suggestion for rehearing in banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, 42 U.S.C. § 1983, and Colo. Rev. Stat. § 13-80-102 are cited herein. *See* App. "J" for the text of these amendments and statutes.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND OF CASE

Petitioner Robert Workman and Respondents Sheriff Ed Jordan and Undersheriff Rick Dill were at all times relevant hereto, and still are, employees of the Weld County, Colorado, Sheriff's Department. In 1987, Respondents Jordan and Dill initiated an investigation of a sheriff's department employee whom Jordan had previously threatened to fire, and at the conclusion thereof, demoted the employee for alleged misconduct. Because Petitioner Workman believed that the employee was not guilty of the charges Jordan and Dill had brought against him, Workman testified at a July 1987 Weld County grievance board hearing on behalf of the aggrieved employee, against the wishes of Respondents. Supp. Comp., Aplt. App. 10 at 4, ¶ 17.

Within 24 hours after Workman's testimony, Jordan and Dill ordered him to attend **a previously unscheduled performance evaluation.** For the first time in his lengthy employment history, Workman was given a below standard evaluation, allegedly because he was not supportive of the sheriff's goals and management style. On all previous and subsequent evaluations, Workman met or exceeded performance expectations. Supp. Comp., Aplt. App. 10 at 4-5, ¶¶ 18-22.

On October 18, 1989, a female employee of the sheriff's department mentioned in passing to a captain in the department that Workman had "stood too closely" to her and pinched her cheek. On October 20, 1989, Undersheriff Dill served Workman with a document advising him that "[a]llegations have been made against you by a female employee at the Sheriff's Office that, if substantiated, may constitute sexual harassment." Supp. Comp., Aplt. App. 10 at 5, ¶¶ 23-25.

On November 14, 1989, Sheriff Jordan issued a **letter of termination** to Workman. That letter lists multiple alleged bases (all of which were later rejected by a neutral hearing officer) for Workman's termination, **including** "sexual harassment" and, significantly, **the derogatory performance evaluation prepared immediately after, and as a result of, Workman's testimony at the co-worker's 1987 hearing.** Comp., Aplt. App. 1 at 45-47. This retaliation in 1989 for Workman's 1987 testimony constitutes one of the two grounds for Workman's claim that Respondents violated his First Amendment

rights. Supp. Comp., Aplt. App. 10 at 33, ¶ 88.

Workman requested that a hearing be conducted to review Respondents' decision to fire him. At that 1990 grievance board hearing, Workman presented evidence that he should not have been terminated and that the stated basis for his discharge was, in actuality, a pretext.

Following a week long evidentiary hearing, an impartial hearing officer, although finding that "[s]ome of Captain Workman's comments were vulgar, sexist and inappropriate in the workplace," concluded, among other things, that: (a) there was insufficient evidence to sustain the charge of sexual harassment; (b) the derogatory performance evaluat[illegible] prepared after Workman testified in the co-worker's grievance hearing could not be used as a basis for the termination because it had been prepared two and one-half years prior to the termination; and (c) Workman's actions were not inconsistent with conduct which is tolerated by the sheriff's department. Therefore, since none of the charges against Workman had been sustained, the hearing officer ordered Workman reinstated in his job as a captain with the sheriff's department. Supp. Comp., Aplt. App. 10 at 18-21, ¶ 61.

Dismayed by the order reinstating Workman, **Respondents retaliated against him for his speech at the grievance hearing.** Jordan and Dill placed in Workman's personnel file (which is available to potential employers) the original letter of termination, a non-appealable letter of reprimand, and a

performance evaluation, all of which were based upon the demonstrably false allegations that were later rejected by the hearing officer. **The hearing officer's findings exonerating Petitioner, however, were not placed in the personnel file.** Also, Respondents, for the first time in the history of the sheriff's department, developed a "re-entry plan" which was designed to harass Workman. In general, they have created a hostile working environment for Workman, including reorganizing the sheriff's department to remove Workman from the administrative decision-making process and publishing statements critical of the hearing officer's findings. Supp. Comp., Aplt. App. 10 at 23-25, 31-32, ¶¶ 65-66, 83(d)-(h). The events described in this paragraph form the second basis for Petitioner's First Amendment claim. Supp. Comp., Aplt. App. 10 at 33, ¶ 89.

II. THE PROCEEDINGS IN THE DISTRICT COURT

On November 13, 1990, Petitioner filed the instant suit in the United States District Court for the District of Colorado. He alleged claims for relief under 42 U.S.C. § 1983 for violation of First Amendment rights and deprivation of property and liberty interests without due process of law and pendent state claims. The district court's jurisdiction was founded upon 28 U.S.C. §§ 1331 and 1367.

The First Amendment claim sets forth two discreet, but very similar, violations of Workman's free speech rights. First, Respondents Jordan and Dill retaliated against Workman in November 1989 by

using the derogatory performance evaluation generated after Workman's 1987 testimony at the co-worker's grievance board hearing **as a justification for terminating Workman**. Second, following Workman's reinstatement, Respondents retaliated against him by placing false and scandalous material in his personnel file, harassing him, and creating a hostile work environment in retaliation for his speech at the 1990 grievance board hearing.

Respondents, in their individual capacities, filed motions to dismiss. One of the defenses was that two years had elapsed since Workman had spoken at the 1987 hearing and, therefore, that the statute of limitations had expired on part of the First Amendment claim. But the district court, recognizing that the complaint (pertinent portions reproduced in App. "A", *infra*, pp 1a - 4a) asserted a First Amendment violation resulting from the 1989 discharge of Workman rather than from the preparation of the derogatory performance evaluation in 1987, **rejected the statute of limitations defense**. Respondents never again raised this defense.

Nevertheless, the district court did dismiss Petitioner's First Amendment claim **on the ground that Workman's testimony at the two grievance board hearings did not constitute speech on a matter of public concern** and, therefore, that Respondents were entitled to qualified immunity on that claim. In addition, the district court denied the asserted qualified immunity defenses to the two due process claims.

Jordan and Dill then filed an interlocutory appeal based upon the denial of their asserted qualified immunity defenses to the due process claims. Petitioner subsequently moved for Fed. R. Civ. P. 54(b) certification on the dismissal of the First Amendment claim, and the district court granted such certification.

III. THE COURT OF APPEALS' DECISION

The United States Court of Appeals for the Tenth Circuit affirmed the dismissal of the First Amendment claim and also dismissed the two due process claims. Notwithstanding the fact that the only issue for appellate review on the free speech claim was whether Workman's testimony at the two grievance board hearings constituted speech on a matter of public concern, the court of appeals sua sponte determined that the portion of the claim based upon Workman's claim of retaliation in 1989 for his earlier testimony at a co-worker's grievance hearing was **time barred**. The court stated, correctly, that the applicable limitations period for § 1983 claims in Colorado is two years and that Petitioner's complaint was filed in November 1990. However, the court believed, incorrectly, that the retaliatory conduct on which the claim was founded occurred in 1987, whereas it actually occurred in 1989. This ruling forms the basis for question number "2" presented for review.

With regard to the second part of Petitioner's First Amendment claim (retaliation against Workman

for his testimony at the 1990 grievance board hearing): the court of appeals found that Workman's testimony "was clearly limited to his termination grievance and was not calculated to address concerns of the public." On that basis, the court held that the 1990 testimony did not constitute speech on a matter of public concern. This ruling forms the basis for question number "1" presented for review.

Thereafter, Petitioner filed a petition for rehearing and a suggestion for rehearing in banc with respect to the First Amendment claims. The Tenth Circuit denied both petitions. Because the court of appeals erred in its resolution of the First Amendment claim, Petitioner filed the instant petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

As will be explained more fully below, there are at least four reasons that the Supreme Court should grant the instant petition. First, as a result of the Tenth Circuit's ruling on Petitioner's First Amendment claim, a **conflict** now exists between the Tenth Circuit and at least one other court of appeals on the issue of whether sworn, truthful testimony before a quasi-judicial, administrative tribunal is inherently speech on a matter of public concern. *See* Sup. Ct. R. 10.1(a). Second, **the protection to be afforded testimonial speech raises a very important constitutional question,** which implicates public policy issues of the highest

magnitude and, therefore, should be settled by the U. S. Supreme Court. *See* Sup. Ct. R. 10.1(c).

Third, the Tenth Circuit **erred** in dismissing as time barred the portion of Petitioner's First Amendment claim which is based upon the 1989 discharge of Workman in retaliation for his testimony at the co-worker's 1987 grievance board hearing. Fourth, it would be **grossly unfair** to allow Workman's employer to retaliate against him for truthful testimony given under oath, regardless of the context in which the testimonial speech was rendered.

II. THE TENTH CIRCUIT'S HOLDING HAS CREATED A CONFLICT WITH THE LAW OF THE FIFTH CIRCUIT.

It is well established that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L. Ed. 2d 708 (1983).

> To be protected, the [employee's] speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.'"

Waters v. Churchill, ___, U.S. ___, ___, 114 S. Ct. 1878, 1884, 128 L. Ed. 2d 686 (1994) (quoting *Connick*, *supra*, 461 U.S. at 142, 103 S. Ct. at 1687).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, **form**, and **context** of a given statement, as revealed by the whole record." *Connick*, *supra*, 461 U.S. at 147-48, 103 S. Ct. at 1690 (emphasis added). **When the form of the speech is sworn, truthful testimony and the context of the speech is testimony before a judicial or governmental tribunal, the expression is inherently a matter of public concern.** Indeed, it is not surprising that most of the courts which have addressed this issue, including the Fifth, Tenth, and Eleventh Circuits and several federal district courts, have concluded that testimonial speech, either at trial or in some other setting, must be protected.

In fact, the Tenth Circuit has twice held that the First Amendment protects the right to testify truthfully at trial. *See Langley v. Adams County*, 987 F.2d 1473, 1479 (10th Cir. 1993) (indicating that testimonial speech is expression on a matter of public concern); *Melton v. City of Okla. City*, 879 F.2d 706, 714 (10th Cir. 1989), *overruled in part on reh'g en banc*, 928 F.2d 920 (10th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 296, 297, 116 L. Ed. 2d 241 (1991).

However, in the instant case, **the Tenth Circuit held that Workman's sworn, truthful testimony was not speech on a matter of public concern because it was rendered in his own post-deprivation hearing rather than in trial or before a grand jury.** This holding places the law

of the Tenth Circuit in direct conflict with that of the Fifth Circuit.

The Fifth Circuit has indeed been a leader in protecting government employees from employer retaliation for testimonial speech. In 1982, that court unambiguously held that "the first amendment protects the right to testify truthfully at trial." *Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982). Three years later, the Fifth Circuit stated that the First Amendment "is certainly broad enough to encompass furnishing truthful information to the grand jury concerning a matter that body was properly investigating, and **such an activity** would, at least absent unusual circumstances, be **a matter of public concern** . . . ." *Neubauer v. City of McAllen*, 766 F.2d 1567, 1572-73 n.5 (5th Cir. 1985) (emphasis added).

In *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987), Ms. Reeves, an employee of the Claiborne County school system, testified in a civil suit (the "*Holloway*" case) on behalf of certain assistant teachers seeking to enjoin the school district from dismissing them. *Id.* at 1098. Because the school system transferred and demoted her, Ms. Reeves filed suit, alleging retaliation "in response to her exercise of First Amendment freedom of speech -- her testimony in the *Holloway* trial." *Id.* at 1099.

After first observing that the content of Ms. Reeves's speech involved a matter of public concern, the court of appeals analyzed the **context** of her speech. The Fifth Circuit emphasized that her truthful "testimony was given under oath in open court" and then held that "[t]he

district court was correct in concluding that Reeves was discharged for exercising rights of free expression protected by the first amendment." *Id.* at 1011.

Most importantly, in a 1989 opinion the Fifth Circuit explicitly applied this First Amendment analysis to testimony adduced during an administrative hearing.

> When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern. . . .
>
> Like testimony before a grand jury and before a district court, [the plaintiff's] testimony before the Harris County Commissioner's Court constitutes speech on a matter of public concern. . . . Given the context in which [the plaintiff] spoke, his testimony constitutes speech on a matter of public concern and, thus, was entitled to First Amendment protection.

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989), *cert. denied,* 493 U.S. 1019, 110 S. Ct. 718, 107 L. Ed. 2d 738 (1990). *See also Czurlanis v. Albanese*, 721 F.2d 98, 104 (3d Cir. 1983) (raising an issue before a governmental body is significant in public concern analysis). Thus, the holdings of the Fifth Circuit in *Johnston* and the Tenth Circuit in the instant case are in direct conflict.

In April 1994, the Eleventh Circuit concluded that deposition testimony is also entitled to First Amendment

protection. "That witnesses (without fear of unwarranted reprisal from government employers) be able to testify truthfully in court proceedings **is a matter of public importance.**" *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994) (citing to *Reeves, supra*) (emphasis added).

Several federal district courts have also concluded that sworn, truthful testimony is inherently a matter of public concern. *E.g., Freeman v. McKellar*, 795 F. Supp. 733, 739-40 (E.D. Pa. 1992) (First Amendment claim stated where plaintiff alleged that defendant retaliated against him for testifying before a grand jury); *Green v. City of Montgomery*, 792 F. Supp. 1238, 1253 (M.D. Ala. 1992) ("the first amendment protects a public employee from employer retaliation for participating in a legal proceeding, either as a party or a witness"); *Ziccarelli v. Leake*, 767 F. Supp. 1450, 1455 (N.D. Ill. 1991) (**"Testimony before an official government adjudicatory or fact-finding body is inherently a matter of public concern."**) (emphasis added); *Moore v. Floro*, 614 F. Supp. 328, 335 (N.D. Ill. 1985), *aff'd*, 801 F.2d 1344 (7th Cir. 1986).

On the other hand, the Fourth Circuit, in accord with the Tenth Circuit, has refused to hold that testimonial speech is automatically accorded public concern status. *See Arvinger v. Mayor & City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988) (reversing the district court).

In sum, because the Tenth Circuit's holding -- that sworn, truthful testimony at a quasi-judicial, administrative hearing is not inherently speech on a

matter of public concern -- conflicts with the holding of at least one other court of appeals, this Court should grant Workman's petition for a writ of certiorari to bring uniformity to the circuits on this crucial constitutional issue, which will certainly recur in other federal and state courts.

III. BECAUSE THE TENTH CIRCUIT'S RULING ON THIS CONSTITUTIONAL QUESTION THREATENS THE INTEGRITY OF THE JUDICIAL SYSTEM, THIS COURT SHOULD REVIEW THAT DECISION.

The staggering importance of the constitutional issue at stake impacts the integrity of the judicial system at all levels and mandates that the Supreme Court grant certiorari here so that it can correct the Tenth Circuit's unacceptable position on the First Amendment's applicability to testimonial expression by government employees. As will be shown below, **truthful testimonial speech rendered in administrative, as well as judicial, forums must be protected to maintain the integrity of the judicial system.**

The Fifth Circuit has eloquently enunciated many of the policy reasons for affording public concern status to sworn, truthful testimony. Consider, for example, this unassailable logic from *Reeves*, *supra*.

> Although both *Neubauer* and *Hightower* involved testimony before a grand jury, we perceive no meaningful distinction between testimony in a criminal proceeding and testimony in a civil proceeding. The concerns

> expressed in *Hightower* are equally applicable here. **To allow a government employer to retaliate via demotion, transfer, or reassignment against an employee's unfavorable trial testimony would undermine the ability of the witness to speak truthfully without fear of reprisal.** Our judicial system is designed to resolve disputes, to right wrongs. **We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth. . . . It was testimony given under oath in an open court** and obtained by service of process. [citation omitted]. Reeves' testimony **truthfully** related the facts and her impressions of the government officials responsible for the personnel decisions of the local school system.

Reeves, supra at 1100-01 (emphasis added).

Can there be a more compelling argument for protecting testimonial speech than that quoted hereinabove? Maybe not, but in *Johnston, supra,* **(involving testimony before a quasi-judicial, administrative tribunal)** the Fifth Circuit's policy arguments calling for protection of speech in a testimonial setting are equally compelling.

> When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern. . . . **We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state.** If employers were free to retaliate

> against employees who provide truthful, but damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security. Those able to risk job security would suffer state-sponsored retaliation for speaking the truth before a body entrusted with the task of discovering the truth. . . . Those unwilling to risk unemployment would scuttle our efforts to arrive at the truth. . . . [W]hen one state employee testifies in another employee's civil action against their mutual state employer, the witness's testimony constitutes a matter of public concern for First Amendment purposes.

Johnston, supra at 1578 (citations omitted).

In order for the results of **any** judicial or quasi-judicial proceeding to be valid, the fact-finder must have access to the true facts of the case. In the context of civil and criminal proceedings, the federal rules of evidence and procedure are consistent with that goal. For example, Fed. R. Evid. 102 describes the goal of the evidence rules as being "that the **truth** may be ascertained and proceedings justly determined." (emphasis added). Directly on point is Fed. R. Evid. 603, **which requires a witness to declare, pursuant to oath or affirmation, that he will testify truthfully**. Additionally, the main purpose of cross-examination is to expose false or misleading testimony. In fact, all pre-trial procedure (and, in a sense, an administrative hearing is pre-trial

procedure for a civil lawsuit) seeks to draw out the facts of a given case.

In its opinions, this Court has frequently championed the need to protect the integrity of the judicial system. *E.g., United States v. Nixon,* 418 U. S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974) **(integrity of the judicial system is built upon full disclosure of all facts)**; *Shotwell Mfg. v. United States,* 371 U.S. 341, 391, 83 S. Ct. 448, 475, 9 L. Ed. 2d 357 (1963) (integrity of the judicial system demands defendants must not be allowed to stand convicted where truthfulness of the evidence has been discredited).

Furthermore, as the Fifth Circuit has recognized, **it is critical that the First Amendment protection afforded testimonial speech extend to speech at quasi-judicial, administrative hearings.** The policy reasons that necessitate protection of testimony at trial are equally applicable to testimony before an administrative tribunal. The most obvious of these reasons is that, if fear of retribution causes a government employee to withhold truthful testimony, the administrative proceeding will not yield constitutionally mandated, meaningful due process. In addition, since an administrative hearing is often the first stage in a civil lawsuit, the failure at the administrative level to develop the true facts of the case will taint the outcome of all subsequent litigation. Furthermore, if a government employee fails to testify truthfully at an administrative hearing, his or her trial testimony could be impeached by the earlier statements. Consequently, it is essential that sworn, truthful testimony in administrative proceedings be afforded the protection of "public" speech.

Finally, there is no compelling reason for permitting a governmental employer to retaliate against an employee for truthful testimonial speech simply because the testimonial speech occurs during the subject employee's own post-deprivation due process proceeding. Such retaliation would not aid the employer in lawfully achieving its governmental goals.

The policy reasons set forth above demonstrate the absurdity of affording First Amendment protection to testimony at trial but not to testimony at a quasi-judicial, administrative hearing. **Where testimonial speech is involved, there is simply no justification for distinguishing between speech on public matters and speech on private matters.** All sworn, truthful testimony before a judicial or quasi-judicial tribunal must constitute speech on a matter of public concern in order to protect the integrity of the judicial system. Accordingly, this Court should grant certiorari to determine whether Workman's testimony at the two grievance board hearings constitutes speech on a matter of public concern.

IV. THE TENTH CIRCUIT ERRED IN HOLDING THAT PART OF PETITIONER'S FIRST AMENDMENT CLAIM WAS TIME BARRED.

Because the Tenth Circuit misconstrued the basis for a portion of Workman's First Amendment claim, it erred in affirming the dismissal of that portion of the claim on the ground that it was time barred. The court of appeals erroneously believed that Workman asserted a First Amendment violation based upon Respondents' generation of the derogatory performance evaluation in

July 1987. While it is true that that conduct was in retaliation for Workman's speech, the preparation of that evaluation was only the first in a series of retaliatory acts resulting from Workman's testimony at the co-worker's hearing. Petitioner's complaint sets forth in paragraphs 53.h.6. and 88 (App. "A", *infra*, pp. 1a - 4a) that **the retaliation which forms this basis for his claim occurred in November 1989, when the Respondents adopted the earlier retaliatory act and used it as a basis for terminating Workman's employment with the Weld County Sheriff's Department.**

On a motion to dismiss, the allegations of the complaint must be construed in the light most favorable to the pleader. Furthermore, it is undisputed that the limitations period for § 1983 claims in Colorado is two years. Therefore, when Petitioner filed his complaint in November 1990 -- twelve months after Respondents fired him for his testimony at the co-worker's hearing -- the statute of limitations had not expired . *See Hunt v. Bennett*, 17 F.3d 1263, 1265-66 (10th Cir.) (applying Colo. Rev. Stat. § 13-80-102; also, § 1983 claims accrue for statute of limitations purposes when the plaintiff knows, or has reason to know of, the injury which is the basis of his action), *cert. denied*, ___ U.S. ___, 115 S. Ct. 107, ___ L. Ed. 2d ___ (1994).

Accordingly, this Court should hold that the court of appeals erred in dismissing on statute of limitations grounds Workman's First Amendment claim arising from the 1989 firing of Petitioner in retaliation for his 1987 testimony at the co-worker's grievance board hearing. This Court should then consider the merits of that portion of the claim. As with the other half of the claim, the

analysis should focus on the fact that Workman's testimony was presented under oath before a quasi-judicial, administrative tribunal and, as such, automatically qualifies as speech on a matter of public concern.

V. THE TENTH CIRCUIT'S FIRST AMENDMENT HOLDING SUBJECTS WORKMAN TO THE INJUSTICE OF EMPLOYER RETALIATION AS A CONSEQUENCE OF PROVIDING TRUTHFUL TESTIMONY UNDER OATH.

In the words of this Court: "it is every man's duty to give testimony before a duly constituted tribunal . . . ." *Ullmann v. United States*, 350 U.S. 422, 439 n.15, 76 S. Ct. 497, 507 n.15, 100 L. Ed. 511 (1956). A person who testifies falsely is subject to being charged with perjury. *See, e.g.,* 18 U.S.C. § 1621. Needless to say, it would be grossly unfair to allow a witness to be subjected to employer retaliation for testifying truthfully, particularly since he could be charged with perjury for lying under oath. Yet, if the Tenth Circuit's holding in the case at bar is allowed to stand, that could be the fate of Mr. Workman and untold others.

In 1987, Workman knew that Jordan and Dill were unfairly demoting a deputy sheriff who was a subordinate employee of Workman. Therefore, Workman performed his civic duty by presenting testimony on behalf of the aggrieved employee *(see Melton, supra*, 879 F.2d at 715 (plaintiff "had a clear duty to testify" and "had an interest in helping a friend")), even though he knew Respondents would be angered by his actions.

In fact, the very day after Workman's testimony, Respondents subjected him to an unscheduled performance evaluation. For the only time in his lengthy law enforcement career, he was rated as not meeting performance standards.

Even after this incident, Jordan and Dill continued to harbor animosity toward Workman. In 1989, following a female employee's casual remark that Workman had stood too close to her and pinched her cheek, Respondents seized upon the opportunity to initiate a sexual harassment investigation of Workman (the employee herself did not want to file a harassment complaint). Because the investigation failed to turn up sufficient evidence to support the harassment charge, Jordan and Dill grounded Workman's firing on a variety of false allegations, which included **references to the 1987 performance evaluation that was the direct result of Workman's exercise of his right of free expression. Without intending to do so, Respondents' inclusion of that evaluation revealed their true motivation in terminating Workman's employment -- to punish him for speaking out on behalf of his co-employee in 1987.** In accordance with the rule that sworn, truthful testimony is inherently a matter of public concern, Respondents' 1989 discharge of Workman in retaliation for his speech at a co-worker's hearing violated his First Amendment rights.

The second violation of Workman's First Amendment rights occurred when the Respondents retaliated against him for his speech at the grievance hearing considering the propriety of Respondents' discharge of Workman. Inasmuch as the testimony at

the second hearing was sworn, truthful testimony, it too constituted speech on a matter of public concern. Accordingly, Respondents' retaliatory conduct after Workman's testimony at his own grievance board hearing also violated his First Amendment rights.

Because the court of appeals dismissed the First Amendment claim on statute of limitations and public concern grounds, it never reached the issues of whether Workman's speech satisfied the other elements of a First Amendment claim and whether, for qualified immunity purposes, the law was clearly established on this subject. Had the court fully analyzed the claim, it would have found that Workman's interest in speaking out -- first, in support of a friend who had been wrongly accused by Jordan and Dill, and second, in disproving the false and stigmatizing allegations against himself in order to regain his livelihood -- outweighed the interest of the employer in suppressing his testimony. With regard to causation, the complaint alleges that the discharge of Workman and the hostile actions following his successful appeal and reinstatement were in retaliation for his testimonial speech at the two hearings. Thus, Petitioner's complaint establishes all of the elements necessary for a successful First Amendment claim.

With regard to the qualified immunity defense, Respondents argue the law was not clearly established that retaliation against Workman for his hearing testimony was unconstitutional. Respondents' position, however, is untenable in light of the pre-November 1990 decisions of the Fifth Circuit, several district courts, and ironically the Tenth Circuit.

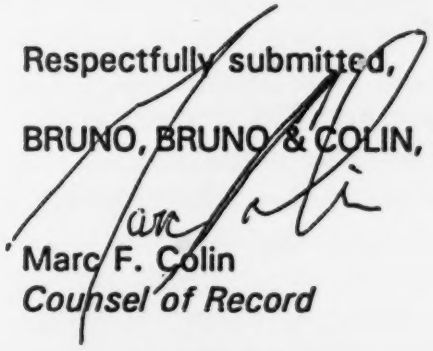
Accordingly, since Petitioner has set forth all of the elements of a First Amendment claim against Respondents and since it would be a true injustice to allow Workman to be subjected to retribution for providing truthful testimony under oath, this Court should grant this petition for a writ of certiorari and subsequently correct the erroneous ruling of the Tenth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUNO, BRUNO & COLIN, P.C.



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December 1994

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 90 M 2012

ROBERT WORKMAN and JUDY WORKMAN,

Plaintiffs,

vs.

SHERIFF ED JORDAN, in both his individual and official capacities; UNDERSHERIFF RICK DILL, in both his individual and official capacities; CAPTAIN MICHAEL MILLER, in his official capacity; DAVID WORDEN, in his individual and official capacity, and WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS, OF THE COUNTY OF WELD,

Defendants.

SUPPLEMENTED COMPLAINT

COME NOW, the Plaintiffs above named, by and through their attorneys, BRUNO, BRUNO & COLIN, P.C., by Marc F. Colin, and would herewith cause to be filed their Supplemented Complaint against Defendants above named, and AS GROUNDS THEREFORE WOULD STATE, AVER AND ALLEGE THE FOLLOWING:

I. JURISDICTIONAL ALLEGATION

1. This action is brought pursuant to Title 42 United States Code, §1983 and §1988. Jurisdiction is founded upon Title 28 United States Code, §1331 and §1341(3) and (4) and the aforementioned statutory provisions, as well as the First and Fourteenth Amendments to the United States Constitution and Article II of the Constitution of the State of Colorado. Plaintiffs move this Honorable Court to exercise pendant jurisdiction over their claims founded upon violations of the Constitution of the State of Colorado, specifically the due process clause in Article II, Section 25 thereof, as well as state contract, statutory and tort claims.

. . . .

53. From October 18, 1989, through November 14, 1989, Defendants engaged in the following conduct, both individually and together with the specific intent to deny to Plaintiff Workman his constitutionally protected right to pre-deprivation due process of law, and in so doing deprived him of property and liberty interests in the following particulars:

. . . .

h. Defendant Jordan's letter of termination (Exhibit D) contains numerous false statements or statements which assume undisclosed, defamatory facts. For example:

. . . .

6. The November 14, 1989, letter of termination also refers in substantial length to the hereinabove described July, 1987, Performance Evaluation conducted immediately following Workman's testimony against Defendants Jordan and Dill before the Weld County Grievance Board. Defendant Jordan refers at length to the evaluatory meeting which took place at that time, as well as the written entries in the July 1987, Workman Performance Evaluation. Clearly, by Defendant Jordan's own written admissions, this incident and the resultant poor Performance Evaluation of July 1987, formed in substantial part, the basis for Workman's termination in November of 1989. This July, 1987, evaluation was initiated and implemented solely in retaliation for Plaintiff's testimony against Defendants Jordan and Dill, and was completely inaccurate and known to be false by its authors, Dill and Jordan.

. . . .

XI. THIRD CLAIM FOR RELIEF
(Title 42 U.S.C Section 1983, Violation of Plaintiff's First Amendment Rights)

85. The allegations and averments made and contained in paragraphs 1 through 68, in paragraphs 69

through 81 of Plaintiff's First Claim for Relief, and in paragraphs 82 through 84 of Plaintiff's Second Claim for Relief, are restated and realleged as if fully set forth verbatim herein.

86. Defendants Jordan and Dill originally retaliated against Plaintiff Workman for his exercise of First Amendment rights after Plaintiff's testimony against Defendants Jordan and Dill in the Grievance Board hearing on behalf of a co-employee in July of 1987, wherein he disclosed information adverse to Defendants Jordan and Dill's efforts to wrongfully demote a subordinate employee.

87. Within hours following such testimony, Defendants retaliated by imposing a disciplinary suspension against Plaintiff Workman and giving him his only below average employee evaluation in his then, ten years of service.

88. This retaliatory act was adopted and served in part as the basis for Defendants justification of Plaintiff's termination in November of 1989, following which the Plaintiff again exercised his rights under the First Amendment to the United States Constitution to Petition for redress of his grievance under the policies and procedures embodied in the Weld County Personnel Policies Manual and the Weld County Sheriff's Department Operations Directives.

89. As more specifically set forth above, upon Plaintiff's successful appeal of his termination, Defendants Jordan, Dill and Worden again retaliated against the Plaintiff for his exercise of his First

Amendment rights in connection with such appeal by disregarding the Findings, Conclusions and Decision of the Hearing Officer and disciplining the Plaintiff with a Letter of Reprimand and poor Performance Evaluation based upon the same facts and circumstances which they had utilized in an attempt to justify the original termination. Plaintiff's right to be free to testify at lawful administrative proceedings, and to petition for redress of his grievances, is secured by the First Amendment to the Constitution of the United States and Defendants and each of them, acted both independently and with complicity in a conspiracy to deprive the Plaintiff of his First Amendment rights and to retaliate against him for exercise of the same.

90. The acts and conduct of the Defendants as more particularly set forth hereinabove, have caused the Plaintiff to suffer injury, damage and loss in an amount to be proven at trial.

. . . .

Dated: May 1, 1992

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-M-2012

ROBERT WORKMAN and JUDY WORKMAN,

Plaintiffs,

v.

SHERIFF ED JORDAN, in both his individual and official capacities; UNDERSHERIFF RICK DILL, in both his individual and official capacities; CAPTAIN MICHAEL MILLER, in his official capacity; DAVID WORDEN, in his individual and official capacity, and WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,

Defendants.

ORDER DISMISSING SEVENTH CLAIM FOR RELIEF AND POSTPONING DISPOSITION OF REMAINDER OF MOTION TO DISMISS UNDERSHERIFF RICK DILL

Upon considering the motion to dismiss, filed by defendant, Undersheriff Rick Dill, on January 7, 1991, and the plaintiff's brief in opposition, filed February 11, 1991, this court concludes that the seventh claim for relief should be dismissed because C.R.S. § 24-50.5-103 is not applicable and the court further concludes that

disposition of the remainder of the issues raised by the subject motion to dismiss should be postponed until trial under the provisions of Rule 12 of the Federal Rules of Civil Procedure and it is therefore

ORDERED that the seventh claim for relief is dismissed against all the defendants and it is

FURTHER ORDERED that disposition of the remainder of the motion to dismiss filed by defendant Undersheriff Rick Dill is postponed until trial on the merits.

Dated: February 12, 1991

BY THE COURT

/s/ Richard P. Matsch, Judge

APPENDIX "C"

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Robert WORKMAN; Judy Workman, Plaintiffs-Appellees,	
v.	No. 91-1067
Sheriff Ed JORDAN, in both his individual capacity and official capacities; Captain Michael Miller, in his official capacity; David Worden, in his individual and official capacities; Weld County By and Through the Board of County Commissioners of the County of Weld, Defendants,	
and	
Undersheriff Rick Dill, in both his individual and official capacities, Defendant-Appellant.	

Robert WORKMAN; Judy Workman,	
Plaintiffs-Appellees,	
v.	No. 91-1132
Sheriff Ed JORDAN, in both his individual capacity and official capacities; David Worden, in his individual and official capacities,	
Defendants-Appellants,	
and	
Undersheriff Rick Dill, in both his individual and official capacities; Captain Michael Miller, in his official capacity; Weld County By and Through the Board of County Commissioners of the County of Weld,	
Defendants.	
Sheriff Ed JORDAN; Undersheriff Rick Dill; David Worden,	
Petitioners,	

v.	**) No. 91-1151**
	)
Richard P. MATSCH, District Judge,	)
	)
Respondent,	)
	)
and	)
	)
Robert Workman and Judy Workman,	)
Real Parties in Interest.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 9-M-2012)

Submitted on the briefs:

Marc F. Colin and Richard A. Stubbs, of Bruno, Bruno & Colin, P.C., Denver, Colo., for Plaintiffs-Appellees.

Cathy H. Greer, Malcolm S. Mead, and Catherine A.G. Sparkman, of Hall & Evans, Denver, Colo., for Defendant-Appellant Undersheriff Rick Dill.

Christina M. Habas, of Watson Nathan & Bremer, P.C., and Robert M. Liechty and Theodore S. Halaby, of Halaby & McCrea, Denver, Colorado, for Defendants-Appellants Sheriff Ed Jordan and David Worden.

Before MOORE, TACHA, and BRORBY, Circuit Judges.

TACHA, Circuit Judge.

Defendants Ed Jordan, Rick Dill, and David Worden appeal from orders postponing until trial a decision on their motions to dismiss Plaintiffs' complaint on grounds of qualified immunity. Defendants request that if we conclude we lack jurisdiction over their appeals, we grant mandamus compelling the district court to decide their motions before trial. We conclude that we have jurisdiction of the appeals, that mandamus does not lie, and that the district court should have addressed the motions to dismiss. We therefore reverse and remand for further proceedings and dismiss the mandamus petition.[1]

Plaintiff Robert Workman was employed by the Weld County, Colorado, Sheriff's Department as a captain. In October 1989, Undersheriff Rick Dill served Workman with notification that allegations had been made that Workman may have sexually harassed a female employee. An investigation was conducted. Workman attended a "predetermination hearing" on November 8, 1989, with Dill and Sheriff Ed Jordan. At the conclusion of the hearing, Jordan terminated Workman.

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[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals and the mandamus proceeding. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cases are therefore ordered submitted without oral argument.

Workman appealed the termination and was afforded a hearing. The hearing officer reversed the termination and ordered Workman reinstated with full back pay. After Workman returned to work, Dill and Jordan placed a letter of reprimand in Workman's personnel file, gave him a negative performance evaluation, and applied a new "reentry plan" to him.

Workman and his wife filed this action against Dill; Jordan; David Worden, the Weld County Personnel Director; Michael Miller, a Weld County Sheriff's Department supervisor; and Weld County. Dill, Jordan, and Worden were sued in their individual and official capacities, Miller in his official capacity only. The complaint alleged deprivations of property and liberty interests without due process and violations of First Amendment rights. It also alleged several state law claims.

Dill moved under Fed.R.Civ.P. 12(b)[2] to dismiss the federal constitutional claims against him in his individual capacity on grounds of qualified immunity. The district court, without explanation, postponed disposition of the

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[2]A defendant can "challenge the complaint under Fed.R.Civ.P. 12(b)(6) on the ground that he or she is entitled to qualified immunity because the pleaded facts fail to show that his or her conduct violated clearly established law of which a reasonable person would have known," or the defendant can raise the immunity issue in a summary judgment motion. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988).

qualified immunity issue until trial. Jordan, Miller, and Worden later joined in Dill's motion to dismiss. The district court, again without explanation, orally postponed their motion to dismiss until trial.

Dill appealed from the order postponing resolution of his motion to dismiss, case No. 91-1067. Jordan, Worden, Miller, and Weld County appealed from the subsequent oral order postponing resolution of Jordan, Worden, and Miller's motion to dismiss,[3] case No. 91-1132. After we questioned our jurisdiction over case No. 91-1067,[4] Jordan, Dill, and Worden commenced an original proceeding in the nature of mandamus to compel the respondent district court judge to consider and decide their pending motions to dismiss based on qualified immunity, case No. 91-1151.

I.

Mandamus is used to compel a lower court to exercise its jurisdiction when it has a duty to do so. *Mallard v. United States Dist. Court,* 490 U.S. 296, 308, 109 S.Ct. 1814, 1821, 104 L.Ed.2d 318 (1989). Mandamus is a drastic remedy which is to be invoked only in extraordinary situations. A petitioner must demonstrate a clear abuse of discretion or conduct

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[3]We subsequently dismissed Miller and Weld County from case No. 91-1132 at their request.

[4]Plaintiffs also moved to dismiss cases Nos. 91-1067 and 91-1132 for lack of jurisdiction. This court referred those motions to the panel assigned to hear the cases on the merits. We now deny both motions.

amounting to usurpation of judicial power; that petitioner lacks an adequate alternative means to obtain the relief he or she seeks; and that the right to issuance of the writ is clear and indisputable. *Id.* at 309, 109 S.Ct. at 1822. "[M]andamus cannot be used as a substitute for appeal." *United States v. Taylor,* 798 F.2d 1337, 1341 (10th Cir.1986). The availability of review by interlocutory appeal "necessarily decreases the availability of the extraordinary writ [of mandamus]." *See Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.),* 911 F.2d 380, 386 (10th Cir.1990). We therefore first address whether defendants have a remedy by appeal.

Courts of appeals have jurisdiction over appeals from final district court decisions pursuant to 28 U.S.C. s 1291. A non-final district court decision is also appealable under this section if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). A major characteristic of an order appealable under Cohen's "collateral order" doctrine is that "'unless [the order] can be reviewed before [the proceedings terminate], it never can be reviewed at all.' " *Mitchell v. Forsyth,* 472 U.S. 511, 525, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (quoting *Stack v. Boyle,* 342 U.S. 1, 12, 72 S.Ct. 1, 7, 96 L.Ed. 3 (1951) (opinion of Jackson, J.)). A decision is reviewable under Cohen if it denies a right that "cannot be effectively vindicated after the trial has occurred." *Id.*

The defense by a public official based on a claim of qualified immunity, if successful, protects the official both from liability as well as from the ordinary burdens of litigation, including far-ranging discovery. *Harlow v. Fitzgerald,* 457 U.S. 800, 817-18, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). *Mitchell* held that a denial of a claim of qualified immunity, to the extent that the denial turns on an issue of law, is immediately appealable. 472 U.S. at 530, 105 S.Ct. at 2817. The Court reasoned that qualified immunity "is an immunity from suit rather than a mere defense to liability ... [that] is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526, 105 S.Ct. at 2815. Further, such an order conclusively determines the defendant's claim of right not to stand trial. *Id.* at 527, 105 S.Ct. at 2816. Finally, the Court noted it has recognized that "a question of immunity is separate from the merits of the underlying action for purposes of the Cohen test." *Id.* at 528-29, 105 S.Ct. at 2817.

The present appeals are from orders postponing a decision on qualified immunity claims rather than denying such claims. Defendants nevertheless argue that the orders fall within the collateral order rule because, unless the orders are immediately appealable, defendants will lose their right to be free from the burdens of pretrial discovery and trial; postponing a decision on the qualified immunity issue conclusively determines that defendants will not be free from having to stand trial; and the issues raised in the qualified immunity defense are separable from and collateral to the rights asserted in the action.

The Fifth Circuit has concluded that an order failing or refusing to decide a qualified immunity claim is immediately appealable under *Mitchell*. In *Helton v. Clements,* 787 F.2d 1016, 1017 (5th Cir.1986), defendants moved to dismiss on grounds of absolute and qualified immunity. The district court ordered that the motion would not be decided before trial. The *Helton* court concluded that the order was appealable under the collateral order test because

> [f]irst, like an explicit denial of a claim of absolute or qualified immunity, the refusal to rule on a claim of immunity until trial is 'effectively unreviewable on appeal from a final judgment.' In both cases a defendant's entitlement under immunity doctrine to be free from suit and the burden of avoidable pretrial matters is effectively lost if the case erroneously goes to trial. Second, like the denial of a claim of immunity, the refusal to rule on such claims 'conclusively determines the defendant's claim of right not to stand trial ... because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred." 'Third, apart from whether a district court denies or refuses to rule on the claim of immunity, the claim of immunity in both cases 'is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.'

Id. (quoting *Mitchell*, 472 U.S. at 527-28, 105 S.Ct. at 2816) (other citations omitted). The court reversed the order and remanded the matter to the district court to consider the motion to dismiss. *Id.*

Helton 's holding was adopted by the Eighth Circuit in *Craft v. Wipf,* 810 F.2d 170, 173 (8th Cir.1987), and the Second Circuit in *Musso v. Hourigan,* 836 F.2d 736, 741 (2d Cir.1988), both of which allowed an appeal from an order that failed to rule on a qualified immunity defense. *See also Zayas-Green v. Casaine,* 906 F.2d 18, 23 (1st Cir.1990) (relying on *Musso, Craft,* and *Helton,* court concluded that defendants had right to appeal from pretrial order refusing to entertain motions raising qualified immunity); Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedures 3914.10 at 674-75 (1992) ("[T]he purpose of protecting officials against the burdens of trial preparation and trial suggests that at some point appeal should be available from failure to make a pretrial ruling on an immunity defense....").

We agree with the Second Circuit's reason for following *Helton*: if we deny appellate review when a district court postpones until trial a ruling on a qualified immunity defense, a defendant would stand to lose whatever entitlement he or she might otherwise have not to stand trial. *Musso,* 836 F.2d at 741. For the reasons set forth in *Helton*, we hold that we have jurisdiction of the appeals from the orders postponing a decision on the motions to dismiss.[5]

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[5]Although the oral ruling may have lacked procedural formality for purposes of appeal, we allow the appeal from this ruling because there is no question as to its finality, *see Aviles v. Lutz,* 887 F.2d 1046, 1047 n.1 (10th Cir. 1989), plaintiffs have not raised the issue, *see Stubbs v. United States,* 620

This holding does not affect our decision in *Maxey ex rel. Maxey v. Fulton,* 890 F.2d 279, 282-83 (10th Cir.1989), that an order is not immediately appealable if it defers a decision on a qualified immunity claim because the claim turns, at least partially, on a fact question; the court is unable to rule on the claim without further factual clarification; and the court permits discovery narrowly tailored to uncover only those facts needed to rule on the claim. *See also Lewis v. City of Ft. Collins,* 903 F.2d 752, 754 (10th Cir.1990). The Fifth and Second Circuits recognize this distinction. *See Lion Boulos v. Wilson,* 834 F.2d 504, 507-08 (5th Cir.1987); *Gaines v. Davis,* 928 F.2d 705, 707 (5th Cir.1991); *Smith v. Reagan,* 841 F.2d 28, 31 (2d Cir.1988) (order holding in abeyance motion to dismiss on Eleventh Amendment immunity grounds, otherwise immediately appealable, might not be immediately appealable if based on need for discovery or other pretrial proceedings relating to disposition of motion).

Having concluded that defendants have a remedy by appeal, we deny their Petition for Writ of Mandamus.

F.2d 775, 776 n. 1 (10th Cir. 1980), the issue disposed of by this ruling was the same as that decided in the written order, and the rights involved are important, *see United States v. Gurney,* 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). *See also Central Milk Producers Coop. v. Sentry Food Stores, Inc.,* 573 F.2d 988, 990 (8th Cir. 1978) (allowing appeal from oral ruling under collateral order doctrine).

II.

Turning to the merits of the appeals, we reiterate that qualified immunity is not only a defense to liability but also entitlement to immunity from suit and other demands of litigation. *Siegert v. Gilley,* --- U.S. ----, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Discovery should not be allowed until the court resolves the threshold question whether the law was clearly established at the time the allegedly unlawful action occurred. *Id.* The question is purely legal, id., and a court cannot avoid answering the question by framing it as factual. *Losavio,* 847 F.2d at 646. The court must first determine whether the actions defendants allegedly took are "actions that a reasonable [person] could have believed lawful." *Anderson v. Creighton,* 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 3042 n. 6, 97 L.Ed.2d 523 (1987). If the actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery. If the actions are not those that a reasonable person could have believed were lawful, then discovery may be necessary before a motion for summary judgment on qualified immunity grounds can be resolved. However, any such discovery must be tailored specifically to the immunity question. *Id.* at 646-47 n. 6, 107 S.Ct. at 3042 n 6.

Certainly, if discovery should not be allowed until the threshold question is resolved, a case should not be permitted to proceed to trial until the question is resolved. In the absence of a showing of unresolved facts bearing on the immunity issue, the district court erred in postponing until trial a decision on the motions to dismiss.

The parties ask us to decide the qualified immunity issue. While there is authority for the parties' request, *see Laidley v. McClain,* 914 F.2d 1386, 1394 (10th Cir.1990) (court addressed issue of qualified immunity on the merits although district court declined to rule on it where appellees raised issue on appeal and all of the pertinent facts were in the record before the court), as a general rule, a federal appellate court does not consider an issue not passed upon below. *R. Eric Peterson Constr. Co. v. Quintek, Inc. (In re R. Eric Peterson Constr. Co.),* 951 F.2d 1175, 1182 (10th Cir.1991). We therefore conclude the matter should be remanded to the district court.

The order of the United States District Court for the District of Colorado is REVERSED, and the matter is REMANDED to the district court for consideration of the motions to dismiss. The Petition for Writ of Mandamus is DENIED.

Dated: March 16, 1992

APPENDIX "D"

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 90-M-2012

ROBERT WORKMAN and JUDY WORKMAN,

Plaintiffs,

v.

SHERIFF ED JORDAN, in both his individual and official capacities; UNDERSHERIFF RICK DILL, in both his individual and official capacities; CAPTAIN MICHAEL MILLER, in his official capacity; DAVID WORDEN, in his individual and official capacity, and WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,

Defendants.

**MEMORANDUM OPINION AND ORDER
ON MOTIONS TO DISMISS**

Pursuant to the mandate of the Tenth Circuit Court of Appeals, issued April 7, 1992, this matter is now before the court on the motion to dismiss filed by the defendant Undersheriff Rick Dill and joined by the other individual defendants, claiming qualified immunity for the claims brought against them, individually, under 42

U.S.C. § 1983. Oral argument on this matter was heard on May 1, 1992. After the hearing, supplemental briefs were filed and the plaintiffs submitted a supplemented complaint adding additional factual allegations. The court must accept the allegations of the complaint, as supplemented, in determining the sufficiency of the claims for recovery of damages for injury to recognized property and liberty interests protected by the United States Constitution. The following statement of facts summarizes these allegations.

Robert Workman began his employment in the Weld County Sheriff's Department as a patrol deputy in April, 1976, was promoted to Sergeant in January, 1978, was promoted to Lieutenant in January, 1979, and was promoted to Captain in November, 1983. Weld County, Colorado, is a home rule county with a personal system established by the County Personnel Manual and Handbook together with related policy documents. The Sheriff's Department employees are included in that personnel system. In 1985, then Sergeant Ed Jordan announced his candidacy for the office of Sheriff of Weld County and told employees of the Sheriff's Department that, when elected, he intended to terminate the employment of Robert Workman and two other employees of the Sheriff's Department because they did not fit into the management style he proposed. Ed Jordan was elected as Sheriff and in July, 1987, a grievance hearing was conducted on disciplinary proceedings initiated by sheriff Jordan and Undersheriff Dill against one of the employees identified in the 1985 statement. Captain Workman testified on behalf of the aggrieved employee and within 24 hours Captain Workman was the subject of an unscheduled evaluation

of his performance resulting in a below standard evaluation because he was not supportive of the Sheriff's goals and management style. Subsequent performance evaluations showed ghat he met or exceeded the expectations of the defendants Jordan and Dill.

In October, 1989, as a result of a statement made to a supervisor, Captain Michael Miller, by a female training coordinator, Susan Jarrett, Captain Workman was served with a "Notice of Internal Investigation" dated October 19, 1989, advising that allegations aabout [sic] him may constitute sexual harassment. Captain Workman was placed on administrative leave pending an investigation. The specific allegations were not included in the notice. The investigation was conducted by members of the Greeley Police Department and the defendants Jordan and Dill directed that the scope of the investigation be broadened to include additional allegations from Ms. Jarrett and from another employee, Marilyn Bedford. Plaintiff was not advised of these allegations.

On November 8, 1989, plaintiff Workman attended a "Pre-determination hearing" with defendants Dill and Jordan at which defendant Dill notified the plaintiff that the personnel department found that sexual harassment did occur and therefore the allegations were sustained. At the conclusion of the hearing, Captain Workman was given a copy of a memorandum from defendant Dill to defendant Jordan, recommending Captain Workman's termination.

A memorandum, dated November 14, 1989, from Sheriff Jordan to Captain Workman advised that Captain

Workman was being terminated based on his overall performance.

Pursuant to the personnel policy, a hearing on the termination was held by a hearing officer appointed by the defendant David Worden, the personnel director for Weld County, Colorado. After an adversarial type hearing, the hearing officer issued Findings of Fact, Conclusions and Decision, resulting in a reversal of the termination and reinstatement with an award of back pay. In reaching that ultimate decision, the hearing officer found that Captain Workman made vulgar, sexist, inconsiderate and inappropriate comments, but that his conduct did not rise to the level of sexual harassment as defined by the hearing officer.

After reinstatement, Captain workman was subject to retaliatory actions taken by defendants Jordan and Dill, including negative performance evaluations and conduct designed to interfere with and frustrate Captain Workman's ability to perform the duties of his position. The objective was to force his resignation.

The plaintiff Workman was denied admission to a training course at the Federal Bureau of Investigation Academy at Quantico, Virginia because the FBI discovered negative information in his personnel file.

The first claim for relief is for deprivation of property without due process of law in violation of the Fourteenth Amendment by failing to provide meaningful pre-termination and post-deprivation hearings with respect to the termination. the second claim for relief is a deprivation of liberty interest without due process o

flaw, in violation of the Fourteenth Amendment because of the memorialization of false and stigmatizing charges in the plaintiff's personnel file, with publication to the FBI officials causing rejection of his application to the Academy as a substantial career enhancement measure. The third claim for relief asserts a violation of the rights protected by the First and Fourteenth Amendments because of retaliation for the plaintiff's testimony on behalf of another employee and Captain Workman's efforts to redress his own grievance. The other claims for relief are claims under state law.

The plaintiffs have not sought recovery against the defendant Captain Michael Miller in his individual capacity and it is not apparent that he is a necessary party to his official capacity. Accordingly, the case is dismissed as to him.

There are no factual allegations sufficient to support liability of the defendant David Worden, individually, even apart from qualified immunity. All that is asserted is that Mr. Worden had responsibilities as the personnel director which he failed to exercise and that he essentially permitted Sheriff Jordan and Undersheriff Dill to control the post-termination hearing. At most, that amounts to non-feasance of office and that is not a basis for liability under 42 U.S.C. § 1983. Moreover, David Worden does not appear to be a proper defendant on the pendent claims. Accordingly, the motion to dismiss will be granted as to him.

Sheriff Jordan and Undersheriff Dill claim that the pre-termination hearing was adequate and that any deficiencies in it were remedied by the relief granted as

a result of the decision of the hearing officer, including reinstatement and an award of back pay. They cite authorities from other jurisdictions in support of that position. The Tenth Circuit Court of Appeals has decided differently in *Wolfenbarger v. Williams,* 774 F.2d 358 (10th Cir. 1985). Moreover, the relief granted administratively was not complete. The plaintiff suffered loses for which he has not been compensated, including attorney's fees for the grievance hearing and the use of his pension funds for living expenses.

The defendants attempt to separate the due process issues with respect to the two hearings. The plaintiff's allegations are sufficient to show that not only was the "predetermination" hearing insufficient under *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), but that there was a continuing effort designed to develop grounds for termination of Captain Workman's employment with defendants Jordan and Dill manipulating both the investigation and the post-deprivation hearing. The latter hearing was procedurally deficient in preventing the plaintiff from attempting to clear his name.

The plaintiff has also alleged sufficient facts to support a claim for deprivation of liberty interests. The hearing officer did not exonerate captain Workman from the allegations of improper and inappropriate behavior toward female employees. Moreover, the material in the personnel file was stigmatizing to a professional law enforcement officer and the FBI access to that file is sufficient publication to justify the claim.

The complaint, as supplemented, does not support a claim for a violation of rights protected by the First Amendment. The speech at issue is not on a matter of public concern under established law. Accordingly, the third claim for relief must be dismissed.

Upon the foregoing, it is

ORDERED that the third claim for relief in the complaint, as supplemented, is dismissed; this civil action is dismissed as to Captain Michael Miller in his official capacity and as to David Worden in his individual and official capacities, and the motions to dismiss the first and second claims for relief by the defendants Sheriff Ed Jordan and Undersheriff Rick Dill are denied.

Dated: April 7, 1993

BY THE COURT:

/s/ Richard P. Matsch

Richard P. Matsch, Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-M-2012

ROBERT WORKMAN and JUDY WORKMAN,

Plaintiffs,

v.

SHERIFF ED JORDAN, in both his individual and official capacities; UNDERSHERIFF RICK DILL, in both his individual and official capacities; CAPTAIN MICHAEL MILLER, in his official capacity; DAVID WORDEN, in his individual and official capacity, and WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,

Defendants.

DIRECTION FOR ENTRY OF FINAL JUDGMENT ON THIRD CLAIM FOR RELIEF

On April 7, 1993, this Court entered a Memorandum Opinion and Order on defendants' motions to dismiss. It denied the motions to dismiss on qualified immunity grounds, but granted dismissal of the third claim for relief, a claim for violation of rights protected by the First Amendment. Defendants filed a Notice of Appeal on April 27, 1993, from the denial of the motion

to dismiss on qualified immunity grounds. The plaintiffs have now filed a motion for entry of final judgment under F.R.Civ.P. 54(b) on the third claim for relief. This Court agrees that final judgment should enter on that claim for relief to permit the plaintiffs to join that appeal with the defendants' pending appeal. Accordingly, it is now

ORDERED that because there is no just reason for delay, the Clerk of this court shall enter final judgment dismissing the plaintiffs' third claim for relief.

Dated: May 11, 1993

BY THE COURT:

/s/ Richard P. Matsch

Richard P. Matsch, Judge

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-M-2012

ROBERT WORKMAN and JUDY WORKMAN,

Plaintiffs,

v.

SHERIFF ED JORDAN, in both his individual and official capacities; UNDERSHERIFF RICK DILL, in both his individual and official capacities; CAPTAIN MICHAEL MILLER, in his official capacity; DAVID WORDEN, in his individual and official capacity, and WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,

Defendants.

JUDGEMENT ON THIRD CLAIM FOR RELIEF

Pursuant to and in accordance with the Direction for Entry of Final Judgment on Third Claim for Relief signed by Judge Richard P. Matsch and filed on May 11, 1993,

Plaintiffs' third claim for relief is DISMISSED WITH PREJUDICE.

Dated at Denver, Colorado, this 11th day of May, 1993.

JAMES R. MANSPEAKER, CLERK

BY Jacob Gilmore
Deputy Clerk

APPENDIX "G"

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT WORKMAN, JUDY WORKMAN, Plaintiffs-Appellees, Cross-Appellants,	)
v.	) No. 93-1138 and 93-1178
ED JORDAN, Sheriff, in his individual capacity; ED JORDAN, Sheriff, in his official capacity; RICK DILL, Undersheriff, In his individual capacity; RICK DILL, Undersheriff, in his official capacity, Defendants-Appellants, Cross-Appellees,	)
and	)
MICHAEL MILLER, Captain, in his official capacity; DAVID WORDEN, in his individual capacity; DAVID WORDEN, in his official capacity; WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendants.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 90-M-2012)

Richard A. Stubbs (Marc F. Colin with him on the briefs) of Bruno, Bruno & Colin, P.C., Denver, Colorado, for Plaintiffs-Appellees and Cross-Appellants.

Cathy H. Greer of Hall & Evans (Malcolm S. Mead of Hall & Evans; Christina M. Habas of Watson, Nathan & Bremer, P.C.), Denver, Colorado, for Defendants-Appellants and Cross-Appellees.

Before BRORBY and McWILLIAMS, Circuit Judges, and BROWN,* District Judge.

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* The Honorable Wesley E. Brown, Senior United States District Court Judge for the District of Kansas, sitting by designation.

BRORBY, Circuit Judge.

The matter presented to this court on appeal is whether Sheriff Ed Jordan and Undersheriff Rick Dill should be granted qualified immunity against claims of due process and First Amendment violations. Sheriff Jordan and Undersheriff Dill appeal the district court's denial of their request for qualified immunity against the due process claims. Robert Workman, the plaintiff,

cross-appeals the district court's dismissal of his First Amendment claim. We reverse in part and affirm in part.

BACKGROUND

We assume the following facts as alleged by the plaintiff are true. Robert Workman is a captain at the Weld County, Colorado, Sheriff's Department. In October 1989, Undersheriff Rick Dill served Captain Workman with a "Notice of Internal Investigation" after a female employee mentioned to another captain in the Sheriff's Department that Captain Workman made inappropriate comments to her. This notice advised Captain Workman he was being investigated for an allegation "if substantiated, may constitute sexual harassment." Specific allegations were not included in the notice.

Undersheriff Dill directed an outside investigator, a member of the Greeley Police Department, to gather facts relating to Captain Workman's alleged sexual harassment. The investigator questioned at least two female employees, as well as Captain Workman.

After the investigation produced evidence of harassment,[1] Sheriff Jordan and Undersheriff Dill notified

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[1]The investigator made factual findings that Captain Workman had made "wolf whistles" at a female employee; stood very close to a female employee and pinched her on the cheek; remarked to a female employee that women should work in jobs involving typewriters; commented about a female

Captain Workman of a hearing at which he would be required to respond to accusations against him and to the recommendation of his termination. Captain Workman attended the pretermination hearing, which was conducted by Undersheriff Dill and Sheriff Jordan. After reviewing the results of the investigation with Captain Workman, Sheriff Jordan terminated Captain Workman's employment. The Sheriff then sent Captain Workman a letter of termination explaining the reasons for the termination and advising Captain Workman of the available grievance procedure.

Captain Workman appealed his termination through the Weld County grievance procedure and was granted a posttermination hearing. This hearing was conducted by an impartial Hearing Officer, and Captain Workman was represented by an attorney. The attorney presented evidence on Captain Workman's behalf, made arguments, and examined and cross-examined witnesses.

The Hearing Officer issued a seven-page "Findings of Fact, Conclusions and Decision." The Hearing Officer concluded "[s]ome of Captain Workman's comments were vulgar, sexist, inconsiderate and inappropriate in the work place"; however, his "actions did not rise to the level of sexual harassment by any definition available to the Hearing Officer." The Hearing Officer reversed the termination and granted reinstatement with full back pay.

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employee's job saying, "maybe we better give this job to a man to get it done right"; called women "bimbo," "sweetie," and "bitch"; made unwelcome touches; and used inappropriate sexual language.

After Captain Workman returned to work, Undersheriff Dill and Sheriff Jordan placed a letter of reprimand in Captain Workman's personnel file along with a "re-entry plan," the letter of termination, and a poor evaluation. When Captain Workman later applied for a training session with the Federal Bureau of Investigation, he was denied admittance. The Federal Bureau of Investigation, after reading Captain Workman's personnel file, banned him from participating in the educational program.

In November of 1990, Captain Workman sued Weld County, its sheriff, undersheriff, and other county employees for deprivation of constitutional rights pursuant to 42 U.S.C. § 1983. Captain Workman asserted deprivation of property and liberty interests without due process of law and alleged a violation of his First Amendment right to free speech. Captain Workman and his wife also brought state claims against the defendants. Undersheriff Dill and Sheriff Jordan were sued in their individual and official capacities.

Sheriff Jordan and Undersheriff Dill moved to dismiss the federal claims against them on the grounds of qualified immunity. The district court initially reserved ruling on these motions to dismiss. On appeal of the district court's decision to postpone ruling on the motions to dismiss, this court directed the district court to rule on the qualified immunity defenses. *Workman v. Jordan*, 958 F.2d 332 (10th Cir. 1992). On remand, the district court held a hearing to evaluate the motions to dismiss. The district court denied the motions with respect to the due process claims but granted the motion to dismiss

Captain Workman's First Amendment claim.[2] The district court entered a final judgment on the First Amendment claim pursuant to Fed. R. Civ. P. 54(b).

Sheriff Jordan and Undersheriff Dill appeal the district court's denial of their motions to dismiss. Captain Workman cross-appeals the district court's dismissal of his First Amendment claim against Undersheriff Dill and Sheriff Jordan.

JURISDICTION

This court has jurisdiction pursuant to the collateral order doctrine to review the district court's denial of the qualified immunity motions to dismiss. 28 U.S.C. § 1291; *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 644 (10th Cir. 1988) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The district court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) on Captain Workman's First Amendment claim; therefore, we also have jurisdiction over Captain Workman's cross-appeal. 28 U.S.C. § 1291; *see Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980) (district court must determine it is dealing with a "final judgment").

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[2]Claims, irrelevant to this appeal, against Michael Miller and David Worden were also dismissed. Mr. Miller was the captain who received the report of sexual harassment. Mr. Worden, as the personnel director, was responsible for the investigation of the allegations of sexual harassment.

We review de novo the district court's denial of qualified immunity. *Bella v. Chamberlain,* 24 F.3d 1251, 1254 (10th Cir. 1994); *Powell v. Gallentine,* 992 F.2d 1088, 1090 (10th Cir. 1993).

QUALIFIED IMMUNITY

Qualified immunity protects public officials from individual liability in a § 1983 action unless the officials violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Once a defendant to a § 1983 action raises a qualified immunity defense, the burden shifts to the plaintiff to show both facts and law to establish that the defendant is not entitled to a qualified immunity. *Dixon v. Richer,* 992 F.2d 1456, 1460 (10th Cir. 1991). The plaintiff must "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood,* 847 F.2d at 646. If the plaintiff meets this burden, then the normal burden of the movant for a motion to dismiss falls again upon the defendant. *See id.*

Since Sheriff Jordan and Undersheriff Dill have raised the defense of qualified immunity, our analysis will focus on whether Captain Workman has met his burden of showing Sheriff Jordan and Undersheriff Dill violated a clearly established federal right. *See Anderson v. Creighton,* 483 U.S. 635 (1987). The three federal rights involved in this case are deprivation of a property right without the due process of law, deprivation of a liberty right without the due process of law, and violation of

Captain Workman's First Amendment right to free speech. After examining each alleged constitutional violation separately, we conclude Captain Workman has failed to show Sheriff Jordan and Undersheriff Dill violated a clearly established federal constitutional right.

A.
DEPRIVATION OF A PROPERTY INTEREST

Captain Workman asserts that Sheriff Jordan and Undersheriff Dill deprived him of a property interest without the procedural protections of the Due Process Clause. Captain Workman claims his property interest is his continued employment with the Sheriff's Department. Weld County, Colorado, is a home rule county and the applicable county employee policy provides employment can only be terminated "for cause." Sheriff Jordan and Undersheriff Dill concede that Captain Workman does have a state-defined property interest in continued employment with the Sheriff's Department. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538 (1985) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972)).

Although Captain Workman has a property interest in continued public employment, we fail to find a deprivation of that property interest. Because a procedurally adequate posttermination hearing actually resulted in Captain Workman's reinstatement, together with back pay for the temporary deprivation of his employment, he cannot now state claim under § 1983 for loss of a constitutionally protected property interest in employment. Our decision in *Archuleta v. Colorado Dep't of Institutions,* 936 F.2d 483 (10th Cir. 1991), controls.

In *Archuleta,* a public employee was terminated without cause but was later reinstated with back pay by the state personnel board. *Id.* at 489. When the employee claimed a § 1983 violation of her substantive due process rights to continued employment, we held "the procedure required by the Due Process Clause served its purpose -- it protected the plaintiff against arbitrary state action by restoring to her the property that was taken." *Id.* at 491. Similarly, the restoration of Captain Workman's job leaves us without a reason to test the propriety of the initial discharge.[3]

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[3]Captain Workman argues our precedent clearly established at the time of his termination that a constitutionally inadequate pretermination hearing could not be cured by an adequate posttermination hearing. *See Wolfenbarger v. Williams,* 774 F.2d 358, 363-65 (10th Cir. 1985), *cert. denied,* 475 U.S. 1065 (1986). *Wolfenbarger* is easily distinguishable as a case involving an actual deprivation of a protected interest.

Similarly, we find the United States Supreme Court's decision in *Zinermon v. Burch,* 494 U.S. 113 (1990), inapplicable. *Zinermon* questioned whether the existence of adequate postdeprivation procedures, such as state tort law proceedings, preclude a claim of constitutional deprivation caused by inadequate predeprivation procedures. The Court found the availability of state proceedings generally could not preclude a § 1983 claim. *Id.* Unlike the case before us, the Court was faced with the deprivation of a protected right and the subsequent denial of an

Captain Workman alleges a long list of procedural errors during his investigation and pretermination hearing, but the fact of his reinstatement remains. "The categories of substance and procedure are distinct . . . . 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Loudermill*, 470 U.S. at 541. Captain Workman's alleged procedural errors do not enlarge his property rights.

Captain Workman also contends the posttermination hearing was inadequate because Sheriff Jordan and Undersheriff Dill would not comply with his requests for documents and because they encouraged witnesses not to participate in the hearing. He further argues the Hearing Officer's lack of authority to enforce subpoenas, rule on motions in limine, or grant prehearing motions to dismiss marred the hearing. Again, we find it difficult to evaluate any grievance procedure as inadequate when the employee was reinstated and given full back pay.[4]

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adequate remedy.

[4]Captain Workman asserts he was additionally injured because the grievance proceeding caused emotional trauma, for which his lack of an employer-sponsored health plan did not cover the psychological care costs, and caused depletion of his savings and pension funds because of living expenses, attorney's fees, and costs. These incidental losses do not give rise to an independent protected property interest. Our authority to award these damages to a successful § 1983 plaintiff is of no matter.

On Captain Workman's allegations, he has not shown a violation of a clearly established constitutional right. A "full posttermination hearing" is understood to include the right to representation by an attorney and the right to cross-examine adverse witnesses. *See Melton v. City of Oklahoma City,* 928 F.2d 920, 939 (10th Cir.), *cert. denied*, 112 S. Ct. 296 (1991); *Prebble v. Brodrick*, 535 F.2d 605, 616 (10th Cir. 1976). The lack of subpoena power available to the plaintiff or the unavailability of some witnesses does not, under the facts of this case, create unconstitutional process. *See Prebble,* 535 F.2d at 615-16. Captain Workman's claim of unlawful deprivation of a property interest fails to meet his burden of showing a violation of clearly established law.

When a procedure produces full protection, we need not examine the procedure for error. We thus reverse the district court's denial of the motion to dismiss this claim.

B.
DEPRIVATION OF LIBERTY INTEREST

Captain Workman also claims he has been deprived of his liberty interest without due process of law. His liberty claim is based on damage to his reputation due to allegedly stigmatizing documents placed in his personnel file by Sheriff Jordan and Undersheriff Dill after his reinstatement. The documents were the letter of reprimand, the termination letter, and the poor job evaluation. The district court denied Sheriff Jordan and Undersheriff Dill qualified immunity against Captain

Workman's assertion that they violated his right to due process associated with the deprivation of a liberty interest.

Once a liberty interest is implicated, the due process protections of the Fourteenth Amendment are innervated and Captain Workman must show he was not afforded an adequate name-clearing hearing. *See Wisconsin v. Constantinueau,* 400 U.S. 433, 437 (1971); *Jensen v. Redevelopment Agency of Sandy City,* 998 F.2d 1550, 1558 (10th Cir. 1993). However, Captain Workman must first show a liberty interest exists and then that the liberty interest was infringed upon.

Captain Workman does have a liberty interest in his good name and reputation as it affects his protected property interest in continued employment. *Paul v. Davis,* 424 U.S. 693, 701 (1976); *McGhee v. Draper,* 639 F.2d 639, 643 (10th Cir. 1981). However, Captain Workman must show how the government infringed upon this liberty interest. First, to be actionable, the statements must impugn the good name, reputation, honor, or integrity of the employee. *Board of Regents v. Roth,* 408 U.S. at 573. Second, the statements must be false. *Codd v. Velger,* 429 U.S. 624, 628 (1977); *Flanagan v. Munger,* 890 F.2d 1557, 1571-72 (10th Cir. 1989); *Wulf v. City of Wichita,* 883 F.2d 842, 869 (10th Cir. 1989). Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. *Paul,* 424 U.S. at 710; *Sullivan v. Stark,* 808 F.2d 737, 739 (10th Cir. 1987). And fourth, the statements must be published. *Bishop v. Wood,* 426 U.S. 341, 348 (1976). These elements are not disjunctive, all must be satisfied to demonstrate

deprivation of the liberty interests. *See, e.g., Melton v. City of Oklahoma City,* 928 F.2d 920 (en banc) (trial court erred in instructing jury to find either stigmatization or loss of employment opportunities), *cert. denied,* 112 S. Ct. 296 (1991).

Captain Workman has not established a colorable showing of falsity. His primary contention is that the letter of reprimand, the performance evaluation, and the letter of termination include the allegations from the two female employees. These allegations, he contends, were rejected by the Hearing Officer. This contention misconstrues the documents and the Hearing Officer's decision.

The Hearing Officer determined the evidence from the independent investigation was accurate. The Hearing Officer concluded, however, the evidence did not amount to sexual harassment or misconduct sufficient to justify immediate termination. The documents in Captain Workman's personnel file do not contradict this conclusion. The letter of reprimand in fact quotes the Hearing Officer's decision. The documents repeat the evidence of the investigation. Captain Workman has not denied the evidence disclosed by the investigation, nor has he offered any other explanation of the documents [sic] falsity. We find the reprinting of the investigator's findings does not establish falsity. *Cf. Melton,* 928 F.2d at 928 (repetition of a third party's allegations is not a false statement).

We recognize one inconsistency between the documents and the Hearing Officer's decision. The letter of reprimand states:

> [Captain Workman's] behavior is contrary to supervisory responsibility set forth in standard 02.B.001 Command and Direction and the Weld County personnel Manual, page 14, F, Deliberate, offensive language or conduct toward the public or fellow employees.

The Hearing Officer's Decision states:

> Given the rather common practice of telling jokes involving sexual innuendos, the use of terms such as "bitch" or "bimbo" or other vulgar language within the agency and with no effort to halt such activity, the actions of Captain Workman could not be considered deliberate, offensive language or conduct toward the public or fellow employees, which would warrant termination.

Finding one inaccurate statement in a personnel document, we turn to whether the statement is shown to harm present employment opportunities. *See Jensen,* 998 F.2d at 1558. Captain Workman contends the defamatory statements in his file caused the FBI to ban him from their educational program, thereby destroying the possibility of other jobs in law enforcement administration. However, Captain Workman has not lost his present position. *See Melton,* 928 F.2d at 927 n.11 (employee need not prove actual denial of a job opportunity if the employee can prove termination based on published false charge). His loss of future positions are too speculative. "[D]amage to 'prospective employment opportunities' is too intangible to constitute a deprivation of a liberty . . . interest." *Phelps v.*

Wichita Eagle-Beacon, 886 F.2d 1262, 1269 (10th Cir. 1989); *Jenson,* 998 F.2d at 1559. Therefore, we find Captain Workman has not shown lost employment opportunities.

Based on our review of Captain Workman's allegations, we are unable to find a sufficient showing of false stigmatizing statements entangled with his interest in employment. We need not inquire whether the posttermination hearing afforded procedural protections of his liberty interest. Since Captain Workman was not deprived a liberty interest, due process does not require an adequate name-clearing hearing. We thus reverse the district court's denial of the motion to dismiss this claim.

C.
FIRST AMENDMENT VIOLATION

Captain Workman's claim of a First Amendment violation has two components. He contends Sheriff Jordan and Undersheriff Dill retaliated against him (1) for testifying at a Weld County grievance board hearing on behalf of a coworker whom had been demoted and (2) for testifying at his own posttermination hearing. The district court dismissed this claim by determining the speech at issue is not a matter of public concern under established law. Captain Workman appeals this ruling in his cross-appeal.

Captain Workman avers the first incident of retaliation was in response to his testimony at a coworker's grievance hearing. Sheriff Jordan and Undersheriff Dill retaliated by imposing a poor employment evaluation within twenty-four hours of his

testimony and without notice. This first claim of retaliation is barred by the statute of limitations. The poor evaluation was given to Captain Workman in July of 1987, and this suit was filed in November of 1990.

Congress provided no statute of limitations for actions under 42 U.S.C. § 1983. However, it is well established that state limitations periods, particularly personal injury limitation periods, are the primary guide for determining time limitations on civil rights actions. *See Wilson v. Garcia,* 471 U.S. 261 (1985). Therefore, Colorado's two-year limitations period applies to this claim. Colo. Rev. Stat. § 13-80-102 (1987).[5] Section

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[5]The Colorado statute on personal injury limitations periods conveniently provides:

> The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues, and not thereafter:
>
> . . . .
>
> (g) All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;
>
> . . . .
>
> (i) All other actions of every kind for which no other period of limitation is provided . . . .

1093 claims accrue when the plaintiff knows or has reason to know of the injury that is the basis of the action. *Hunt v. Bennett,* 17 F.3d 1263, 1266 (10th Cir. 1994) (quoting *Johnson v. Johnson County Comm'n Bd.,* 925 F.2d 1299, 1301 (10th Cir. 1991)), *petition for cert.* filed May 9, 1994 (S. Ct. No. 93-9079). The alleged retaliatory act occurred more than three years before the suit was filed. Captain Workman does not allege any facts or doctrine that would extend the period of filing. *Cf. Hunt,* 17 F.3d at 1266 (declining to decide of [sic] doctrine of continuing violations applies to § 1983 actions). His claim of retaliation against his right to testify at the coworker's hearing is therefore time barred.

Captain Workman avers the second incident of retaliation was in response to his successful appeal of his termination. He claims Sheriff Jordan and Undersheriff Dill retaliated against him for testifying at his termination appeal. The retaliatory act, according to Captain Workman, was the letter of reprimand and the low performance evaluation.

To proceed with his First Amendment claim, Captain workman must show the testimony he gave at his own grievance proceeding "touches upon a matter of public concern." *Connick v. Myers,* 461 U.S. 138, 146 (1983); *Powell v. Gallentine,* 992 F.2d at 1090. Captain Workman contends some of his testimony disclosed the Sheriff's Department's tolerance of a sexist environment, and therefore, the speech touched upon a matter of public concern. A sexist atmosphere in the Sheriff's

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Colo. Rev. Stat. § 13-80-102 (1987).

Department is a matter of concern for the community; however, the Supreme Court in *Connick* explained speech relating to internal personnel disputes is not regarded as a matter of public concern. 461 U.S. at 147-48.

To determine if the speech related only to internal personnel matters and not to the discharge of governmental responsibilities, the court must consider the "content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48. The court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances or to address a broader public purpose. *Patrick v. Miller,* 953 F.2d 1240, 1248 (10th Cir. 1992); *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988). "In drawing the thin line between a public employee's speech which touches on matters of public concern, and speech from the same employee which only deals with personal employment matters, we have looked to the subjective intent of the speaker." *Schalk v. Gallemore,* 906 F.2d 491, 495 (10th Cir. 1990).

Captain Workman's testimony, at his posttermination hearing, was clearly limited to his termination grievance and was not calculated to address concerns of the public. He spoke of the department's tolerance of a sexist environment only to argue to the factfinder that his behavior was not anomalous and thus could not support a termination decision. Captain Workman's motive was to address his personnel conflict and reverse his termination. Considering the content and context of the speech, Captain Workman was airing a grievance of a personal nature, and thus the speech in this case is not protected. *Schalk,* 906 F.2d at 495.

Captain Workman also argues his speech regarded a matter of public concern because it was sworn testimony before a governmental fact-finding body. However, the cases Captain Workman cites to support this proposition are not dispositive. In *Langley v. Adams County*, 987 F.2d 1473, 1478 (10th Cir. 1993), the plaintiff claimed she was retaliated against in response to her testimony against the county in a coworker's federal district court case and for her later reports of discriminatory practices in the county. Captain Workman's testimony was given at his own posttermination proceeding, and he never filed reports of the department's tolerance of sexual harassment. In *Johnston v. Harris County Flood Control Dist.*, the Fifth Circuit pointed out "under certain circumstances . . . the context in which the employee speaks may be sufficient to elevate the speech to the level of public concern." 869 F.2d 1565, 1577 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The *Johnston* court determined the sworn testimony before the county commissioners regarding an employment dispute was a matter of public concern. However, the plaintiff's testimony was given at a coworker's Equal Employment Opportunity hearing.

Captain Workman has not cited any cases holding that sworn testimony in an employee's own grievance proceeding is necessarily of a public concern. Captain Workman has not cited any Tenth Circuit or Supreme Court cases holding that sworn testimony outside of a court or grand jury is necessarily protected speech. *See Langley*, 987 F.2d at 1479; *Melton v. City of Oklahoma City*, 879 F.2d 706, 713-14 (10th Cir. 1989), *appeal after remand* 928 F.2d 920 (10th Cir.), *cert. denied* 112 S. Ct. 296 (1991) (testimony at a friend's trial). Without

such case law support, we are not satisfied that Captain Workman's testimony on his own behalf is per se a matter of public concern. We thus find the dismissal of the First Amendment claim appropriate.

CONCLUSION

For the foregoing reasons, the district court's dismissal of the First Amendment claim against Sheriff Jordan and Undersheriff Dill is AFFIRMED and the denial of dismissal on the due process claims is REVERSED.

Dated: August 16, 1994

APPENDIX "H"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT WORKMAN, JUDY WORKMAN,	)	
Plaintiffs-Appellees, Cross-Appellants,	)	
	)	No.93-1138
v.	)	93-1178
ED JORDAN, Sheriff, in his individual capacity; ED JORDAN, Sheriff, in his official capacity; RICK DILL, Undersheriff, in his individual capacity; RICK DILL, Undersheriff, in his official capacity,	)	
Defendants-Appellants, Cross-Appellees,	)	
and	)	
MICHAEL MILLER, Captain, in his official capacity; DAVID WORDEN, in his individual capacity; DAVID WORDEN, in his official capacity; WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,	)	
Defendants.	)	

ORDER
Entered October 11, 1994

Before BRORBY and McWILLIAMS, Circuit Judges, and BROWN*, District Judge.

***The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.**

This matter comes on for consideration of appellees petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISCHER,
Chief Deputy Clerk

By: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX "I"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT WORKMAN, JUDY WORKMAN,	)	
	)	
Plaintiffs-Appellees, Cross-Appellants,	)	
	)	No. 93-1138
v.	)	93-1178
	)	
ED JORDAN, Sheriff, in his individual capacity; ED JORDAN, Sheriff, in his official capacity; RICK DILL, Undersheriff, in his individual capacity; RICK DILL, Undersheriff, in his official capacity,	)	
	)	
Defendants-Appellants, Cross-Appellees,	)	
	)	
and	)	
	)	
MICHAEL MILLER, Captain, in his official capacity; DAVID WORDEN, in his individual capacity; DAVID WORDEN, in his official capacity; WELD COUNTY BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,	)	
	)	
Defendants.	)	

ORDER
Entered October 17, 1994

Before BRORBY and McWILLIAMS, Circuit Judges, and BROWN*, District Judge.

***The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.**

Due to clerical error the order of October 11, 1994, is reissued as follows:

This matter comes on for consideration of appellees petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISCHER, Chief Deputy Clerk

By: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX "J"

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Colo. Rev. Stat. § 13-80-102 provides:

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after

the cause of action accrues, and not thereafter:

(a) Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract; except that this paragraph (a) does not apply to any tort action arising out of the use or operation of a motor vehicle as set forth in section 13-80-101(1)(n);

(b) All actions for strict liability, absolute liability, or failure to instruct or warn;

(c) All actions, regardless of the theory asserted, against any veterinarian;

(d) All actions for wrongful death;

(e) Repealed L. 87, p. 567, § 8, effective July 1, 1987.

(f) All actions against any public or governmental entity or any employee of a public or governmental entity for which insurance coverage is provided pursuant to article 14 of title 24, C.R.S.;

(g) All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;

(h) All actions against any public or governmental entity or any employee of a public or governmental entity, except as otherwise provided in this section or section 13-80-103;

(i) All other actions of every kind for which no other period of limitation is provided;

(j) All actions brought under section 42-6-208, C.R.S.;

(k) All actions brought under section 13-21-109(2).

(2)

No. 94-1112

FILED
FEB 21 1995

In The

Supreme Court of the United States

October Term, 1994

ROBERT WORKMAN,

Petitioner,

vs.

SHERIFF ED JORDAN, in his individual capacity, and UNDERSHERIFF RICK DILL, in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a government employee's testimony regarding matters of purely personal interest at a quasi-judicial, administrative hearing is inherently a matter of public concern subject to First Amendment protection?

2. Whether a First Amendment claim is timely filed under a two year statute of limitations where the allegations of the complaint, filed in November of 1990, show that the employee was injured in July of 1987 when he was placed on disciplinary suspension and given an adverse performance review in alleged retaliation for his testimony at a co-employee's grievance hearing, which adverse performance review then caused the employee additional injury when it was used in substantial part in November of 1989 as the basis for his termination?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Statement of Facts	1
A. Factual Background	1
B. Federal Proceedings	6
Reasons for Denying the Writ	7
Summary of Argument	7
I. The Tenth Circuit's holding does not create a conflict with the law of the Fifth Circuit.	9
II. The deviation by the Fifth Circuit from this Court's "public concern" requirement does not justify issuing the writ of certiorari to the Tenth Circuit.	10
III. Respondents' conduct in alleged retaliation for Workman's speech at his 1990 grievance hearing is too insubstantial to justify constitutional scrutiny in federal court.	21
IV. The Tenth Circuit properly found Workman's free speech claim, to the extent based upon an alleged incident in 1987, to be time-barred.	25

Contents

Page

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984) 17, 20

Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75 (4th Cir. 1988) 13, 14, 15

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988) 18

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 11

Brawner v. City of Richardson, 855 F.2d 187 (5th Cir. 1988) 13

Connick v. Myers, 461 U.S. 138 (1983) 7, 8, 11, 12, 12, 20, 21, 22, 24

Curl v. Reavis, 740 F.2d 1323(4th Cir. 1984) 15, 20

Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983) 13, 14, 18

Dalton v. Dow Chemical Co., 280 Minn. 147, 158 N.W.2d 580 (1968) 28

Contents

Page

Day v. South Park Independent School Dist., 768 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986) ... 18

Doyle v. Linn, 37 Colo. App. 214, 547 P.2d 257 (1975) ... 28

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 14, 15, 16

Freeman v. McKellar, 795 F. Supp. 733 (E.D. Pa. 1992) .. 18

Garrison v. Louisiana, 379 U.S. 64 (1964) 21

Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979) 11, 12, 22

Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) 13, 15, 18

Green v. City of Montgomery, 792 F. Supp. 1238 (M.D. Ala. 1992) 18

Housing Authority v. Leo A. Daly Co., 35 Colo. App. 244, 533 P.2d 937 (1975) 28

Hunt v. Bennett, 17 F.3d 1263 (10th Cir. 1994), *cert. denied*, __U.S.__, 115 S. Ct. 107 (1994) 25

Johnston v. Harris County Flood Control District, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) 7, 9, 10, 11, 15, 18, 19

Contents

Page

Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988) 14

Lathrop v. Entenmann's Inc., 770 P.2d 1367 (Colo. App. 1989) 19

Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992) 19

Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992) 15

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) .. 14

Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *cert. denied*, __U.S.__, 112 S. Ct. 297 (1991) .. 10

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 11, 22

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 21

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), *cert. denied*, __U.S.__, 114 S. Ct. 634 (1993) 13

Olson v. Bell Telephone Laboratories, Inc., 388 Mass. 171, 445 N.E. 2d 609 (1983) 28

Parratt v. Taylor, 451 U.S. 527 (1981) 24

Contents

Page

Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992) 19

Paul v. Davis, 424 U.S. 693 (1976) 20

Perry v. Sindermann, 408 U.S. 593 (1972) 22

Pickering v. Board of Education, 391 U.S. 563 (1968) 10, 11, 14, 22, 24

Rankin v. McPherson, 483 U.S. 378 (1987) 11, 12, 14, 19, 22

Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096 (5th Cir. 1987) 17,18

Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984), *cert. denied,* 469 U.S. 823 (1984) 18

Rice v. Ohio Dept. of Transportation, 887 F.2d 716 (6th Cir. 1989), *vacated on other grounds,* 497 U.S. 1001 (1990) 13, 14, 15

Sandutch v. Muroski, 684 F.2d 252 (3d Cir. 1982) 26, 28

Santella v. Grishaber, 654 F. Supp. 428 (N.D. Ill. 1987) .. 18

Schalk v. Gallemore, 718 F. Supp. 862 (D. Kan. 1989) ... 18

Siegert v. Gilley, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991) 24

Contents

Page

Singleton v. City of New York, 632 F.2d 185 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) 26, 28

Smith v. Cleburne County Hospital, 870 F.2d 1375 (8th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989) 14

Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992) 14

Thornhill v. State of Alabama, 310 U.S. 88 (1940) 11

Ullman v. United States, 350 U.S. 422 (1956) 17

Waters v. Churchill, __U.S.__, 114 S. Ct. 1878 (1994) ... 11, 22

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2nd Cir. 1993), *cert. denied*, __U.S.__, 114 S. Ct. 185 (1993) 13

Wilson v. Garcia, 471 U.S. 261 (1985) 25

Workman v. Jordan, 32 F.3d 475 (10th Cir. 1994) 7, 8, 10, 14, 15, 22, 25, 26

Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412 (7th Cir. 1988) 14, 15, 16

Ziccarelli v. Leake, 767 F. Supp. 1450 (N.D. Ill. 1991) ... 18

Statutes Cited:

42 U.S.C. § 1983 .....6, 9, 25, 26, 28

Contents

Page

Colo. Rev. Stat. § 13-80-102(1)(a) 25

Colo. Rev. Stats. §§ 24-50.5-101, *et seq.* 19

United States Constitution Cited:

First Amendment .....i, 7, 10, 11, 17, 18, 20, 21, 24, 25, 28

Rule Cited:

Supreme Court Rule 15.1 1

STATEMENT OF FACTS[1]

A. Factual Background

Respondent Ed Jordon is the duly elected sheriff of Weld County, Colorado. Respondent Rick Dill is the appointed undersheriff in the Weld County Sheriff's Office. Petitioner Robert Workman is a captain in the Weld County Sheriff's Office. At all times relevant to this lawsuit, all three people occupied the positions stated (Aplt. App. at Tab 1, pp.1-2, ¶¶ 2-4). This lawsuit concerns the conduct of Captain Workman toward female employees in the Weld County Sheriff's Office, and the efforts of Sheriff Jordan and Undersheriff Dill to deal with such conduct.

In the spring of 1989, two female employees in the sheriff's office complained to Sheriff Jordan about "rude treatment" and "inappropriate comments" by Workman (*Id.* at 89). In June of 1989, two female employees of the sheriff's office met with Sheriff Jordan and Undersheriff Dill to complain about Workman's abrupt and rude demeanor (*Id.* at 8, ¶ 33). One of these employees, Marilyn Bedford, complained that Workman had been rude to her, that he had made a sexist remark to her and that he had called her a bitch (*Id.* at 8-9, ¶¶ 30, 33). The other employee, Susan Jarrett, complained of receiving a "wolf whistle" as she passed Workman's office, that Workman had called her "red riding hood" when she wore a red dress, that

---

1. The following statement of facts is taken from the allegations of Workman's complaint and the attached documents (Aplt. App. at Tab 1). In keeping with the appropriate standard of review, all of the factual allegations of the complaint are accepted as true, except where specifically contradicted by the documents attached to the complaint. Where Workman has attached a document and summarized its contents, but the summary is contradicted by the document, the facts as contained in the referenced document are adopted. This statement of facts is also presented with the admonition of Rule 15.1 of the Rules of the Supreme Court in mind. References are to the Appellant's Appendix which was filed in the underlying appeal in the Tenth Circuit.

Workman had made a comment about her fiance, and that Workman had said her services were not needed by the sheriff (*Id.* at 8-9, ¶¶ 31, 33). On October 18, 1989, Susan Jarrett complained to a supervisory employee in the sheriff's office that on October 13, 1989 Workman had stood too close to her and pinched her cheek (*Id.* at 5, ¶ 23). Sheriff Jordan and Undersheriff Dill received "specific, actual and contemporaneous knowledge of these complaints." (*Id.* at 8, ¶ 36).

On October 19, 1989, Undersheriff Dill issued to Workman a memorandum regarding "Notice of Internal Investigation" stating that allegations had been made against Workman by a female employee at the Weld County Sheriff's Office which "if substantiated, may constitute sexual harassment," placing Workman on administrative leave and notifying Workman that the personnel department would be initiating an investigation of the allegations (*Id.* at 5, ¶ 24 and p. 42). The investigation was conducted by an officer from the police department of the City of Greeley, Colorado (*Id.* at 5-6, ¶ 26). At the conclusion of his investigation, the investigator made the following factual findings:

1. Workman had made "wolf whistles" to a female employee which intimidated her into changing her dress.

2. Workman violated the personal space of female employees. In one case he had stood only a few inches from Susan Jarrett.

3. Workman pinched Susan Jarrett on the cheek.

4. Workman made a sexist remark to Susan Jarrett about how women should work in jobs involving typewriters.

5. Women reported "unwelcomed touches" by Workman.

6. Some women in the sheriff's office perceived that Workman believes women are lower than men.

7. Workman made a comment to Marilyn Bedford that "maybe we better give this job to a man to get it done right."

8. Workman created a level of fear among female employees.

9. Workman's behavior caused emotional stress among the female employees, evidenced by the crying of a few female employees.

10. Workman used inappropriate language of a sexual nature.

11. Workman called women "bimbo," "sweetie," "bitch."

(*Id.* at 43-44). Based upon a review of the factual information compiled by the investigator, David Worden, Acting Director of Personnel for Weld County, concluded that Workman was guilty of sexual harassment:

> It is my finding that Capt. Workman's behavior had the effect of creating a sexually intimidating, hostile, and offensive working environment. This is evidenced throughout the interviews of women in the department.

* * *

> It is my feeling that there was some sexual harassment. He has created a hostile working environment towards certain female employees, in particular, Susan Jarrett, Marilyn Bedford and Linda Hartley. He has at times used comments and behaviors of a sexual nature to help create this environment.

(*Id.* at 43-44).

On November 8, 1989, Workman attended a "predetermination hearing" with Sheriff Jordan and Undersheriff Dill, to discuss the results of the investigation (*Id.* at 10, ¶ 43). Because the investigation sustained the charge of sexual harassment, Undersheriff Dill recommended to Sheriff Jordan that Workman be terminated. (*Id.*) Following the "predetermination hearing," Workman was given a copy of the results of the investigation (*Id.* at 8-9,1 ¶ 38), and Sheriff Jordan terminated Workman's employment (*Id.* at 10, ¶ 43). On November 11, 1989, Sheriff Jordan gave Workman a written notice of termination which states in part:

> The findings from the Personnel Department were sustained in the matter of Sexual Harassment, stating that your "behavior had the effect of creating a sexually intimidating, hostile, and offensive working environment." This is evidenced through the interview of women in the department. Again, I refer you to page 13 of the Weld County Personnel Policy Handbook, paragraph SEXUAL HARASSMENT, wherein this conduct is again cause for "strong disciplinary action up to and including termination."

(Aplt. App. at Tab 1, pp. 45-46).

Workman appealed his termination pursuant to established grievance procedures (*Id.* at 15-18). The hearing on Workman's appeal was conducted by a neutral hearing officer; Workman was represented by an attorney; and Workman was given extensive due process rights (*See id.* at 15-18, particularly pp. 15-16, ¶ 55). The post-deprivation grievance hearing commenced on March 6, 1990, and continued over several days (*Id.* at 48). Numerous witnesses testified and nearly thirty exhibits were introduced, including transcripts of interviews with department employees. (*Id.*) At the conclusion of the proceeding, the hearing officer issued a seven-page opinion containing findings of fact, conclusions of law and his decision sustaining Workman's grievance, reversing his termination and ordering reinstatement (*Id.* at 48-54). Although the hearing officer specifically found that "some of Captain Workman's comments were vulgar, sexist, inconsiderate and inappropriate in the work place," he nonetheless concluded that Workman's conduct "did not rise to the level of sexual harassment" and therefore that his termination should be reversed (*Id.* at 48-54). On April 11, 1990, Workman was reinstated to his position at the Weld County Sheriff's Office "with all back pay." (*Id.* at 1-2, ¶ 2).

Following Workman's reinstatement, Undersheriff Dill placed in Workman's personnel file a letter of reprimand and performance appraisal and subjected Workman to a "re-entry plan." (*Id.* at 23-24, ¶¶ 66.a-d). The letter of reprimand and performance appraisal essentially inform Workman that his conduct toward women, although not found by the hearing officer to rise to the level of sexual harassment, would no longer be tolerated (*Id.* at 67-76). The reprimand letter explains what standard of conduct would be required (*Id.* at 67-68); the performance appraisal identifies specific areas of conduct needing improvement and recommends that Workman attend various training classes and seminars to effectuate that improvement (*Id.* at 72-76); and the re-entry plan imposes a

number of responsibilities, duties and tasks on Workman, for which his performance could again be evaluated (*Id.* at 24, ¶ 66.d).

On January 27, 1992, the Federal Bureau of Investigation ("FBI") reviewed Workman's personnel file as part of a background check in connection with Workman's application to the FBI Academy at Quantico, Virginia (Aplt. App. at Tab 9 and Tab 10, pp. 31-32, ¶¶ 83.f-83.h). The FBI was able to review Workman's letter of termination, the hearing officer's findings, the order reinstating Workman to his position as captain, the letter of reprimand and the performance evaluation. (*Id.* at ¶ 83.g). Following its review of this material, the FBI denied Workman admission to the Academy (*Id.* at ¶ 83.h).

B. Federal Proceedings

On November 13, 1990, Workman sued Weld County, Sheriff Ed Jordan, Undersheriff Dill and other defendants in the United States District Court for the District of Colorado, alleging various theories of relief under 42 U.S.C. § 1983 and state law (Aplt. App. at Tab 1). As relevant here, Workman alleged that Sheriff Jordan and Undersheriff Dill in both their individual and official capacities violated Workman's rights under 42 U.S.C. § 1983 to procedural due process, liberty interests and freedom of speech (Aplt. App. at Tab 1, pp. 26-32).

Sheriff Jordan and Undersheriff Dill moved to dismiss the federal claims against them in their individual capacities on the basis of qualified immunity (Aplt. App. at Tab 2, pp. 14-16, and Tab 5). The district court denied this motion (Aplt. App. at Tab 13). Nonetheless, the district court dismissed on the merits the third claim for relief alleging a violation of Workman's right to free speech (*Id.* at 5).

Respondents Jordan and Dill, in their individual capacities,

appealed the denial of their motions to dismiss based upon qualified immunity. Petitioner Workman cross-appealed the dismissal of his third claim for relief. The United States Court of Appeals for the Tenth Circuit reversed the district court's ruling on qualified immunity but affirmed the dismissal of the First Amendment claim. *Workman v. Jordan,* 32 F.3d 475 (10th Cir. 1994). The Tenth Circuit found the First Amendment claim barred in part by the appropriate statute of limitations and in part by the personal nature of Workman's speech. *Id.* The Tenth Circuit subsequently denied Workman's petition for rehearing and suggestion of rehearing *en banc* with respect to his First Amendment claim.

REASONS FOR DENYING THE WRIT

Summary of Argument

The decision below does not create a conflict with decisions of the Fifth Circuit over what constitutes speech on a matter of public concern. The Fifth Circuit has held that testimony by one employee at a co-employee's equal employment opportunity hearing is inherently a matter of public concern. *Johnston v. Harris County Flood Control District,* 869 F.2d 1565,1576-1579 (5th Cir. 1989), *cert. denied,* 493 U.S. 1019 (1990). The Tenth Circuit did not reject that holding, but merely declined to extend it to testimony by one employee at his own personnel grievance hearing. *Workman v. Jordon,* 32 F.3d 475, 483 (10th Cir. 1994). Thus, this case does not present the Court with an appropriate opportunity to review the Fifth Circuit's test for protected speech.

The First Amendment protects employee speech on matters of public concern because such speech occupies the "highest rung [in] the hierarchy of First Amendment values," and is essential to our system of self-government. *Connick v. Myers,* 461 U.S. 138, 145 (1983). Conversely, when the employee's speech does not address matters of public concern, the government employer is

allowed "wide latitude" in managing its personnel, because such speech does not contribute to the marketplace of ideas. *Connick, supra,* 461 U.S. at 146. The context alone of the employee's speech cannot automatically elevate it to a matter of public concern any more than the cover of a book can transform the nature of its contents. Quite simply, petitioner's argument elevates form (testimonial speech) over substance (the public concern requirement), and has been properly rejected by nearly every circuit to consider it.

There is a third reason for refusing to issue the writ with respect to petitioner's free speech claim, to the extent that claim is based upon actions allegedly taken in retaliation for his testimony at his own grievance hearing in March of 1990. The alleged acts of retaliation for this speech upon which petitioner focuses consist of the placing of true documents (a letter of reprimand and a performance appraisal) in his personnel file, and subjecting petitioner to a "re-entry plan" (essentially, a list of duties). Although petitioner argues that the contents of these documents are false, the record demonstrates to the contrary, as specifically found by the Tenth Circuit. *Workman, supra,* 32 F.3d at 481. In retaliation for his speech in 1990, petitioner was not fired, demoted, denied promotion or denied any other substantial benefit. To the contrary, following his 1990 testimony, petitioner was restored to his former position as a captain in the Weld County Sheriff's Office and given an award of all back pay (Aplt. App. at Tab 10, p. 2, ¶ 2). The acts of retaliation allegedly taken in response to petitioner's 1990 speech are simply too insubstantial to merit constitutional scrutiny.

The Tenth Circuit also properly found petitioner's free speech claim, to the extent based upon allegations of actions taken in retaliation for his testimony at a co-employee's grievance hearing in July of 1987, to be time-barred under the applicable two year statute of limitations. *Workman, supra,* 32 F.3d at 482. Accepting the allegations of his complaint, petitioner

knew in July of 1987 that respondents had retaliated against him for testifying at his co-worker's grievance by placing him on disciplinary suspension, subjecting him to an unscheduled performance appraisal and giving him his first unsatisfactory performance review in his lengthy employment history. The allegation that respondents subsequently relied in part upon this unsatisfactory performance appraisal as grounds for dismissing petitioner in November of 1989 merely shows the development of additional injury from the initial act of retaliation. Because petitioner could have maintained an action for damages under 42 U.S.C. § 1983 in July of 1987 for the injury allegedly caused by his disciplinary suspension and unsatisfactory performance review, the Tenth Circuit properly found petitioner's November 1990 claim for retaliation against his July 1987 testimony to be time-barred.

I. THE TENTH CIRCUIT'S HOLDING DOES NOT CREATE A CONFLICT WITH THE LAW OF THE FIFTH CIRCUIT.

Focusing on a perceived disagreement between the decision below and the decision of the United States Court of Appeals for the Fifth Circuit in *Johnston, supra,* Workman urges this Court to issue a writ of certiorari to the Tenth Circuit in order to resolve the issue of whether a government employee's testimonial speech at his grievance hearing, no matter how personal or trivial, is inherently a matter of public concern. This Court should decline the invitation for numerous reasons, as explained herein. First among them, however, is the absence of any substantial disagreement between the Fifth and Tenth Circuits.

In *Johnston, supra,* the Fifth Circuit held that sworn, testimonial speech by a government employee at a co-employee's equal employment opportunity hearing is inherently a matter of public concern. 869 F.2d at 1578. In contrast to the situation in *Johnston*, the case at hand does not involve testimony by one

employee at another employee's equal employment opportunity hearing, but testimony by one employee at his own personnel grievance hearing.[2] After discussing *Johnston*, the Tenth Circuit noted that Workman "has not cited any cases holding that sworn testimony in an employee's grievance proceeding is necessarily of a public concern." *Workman, supra*, 32 F.3d at 483. The Tenth Circuit has acknowledged that one employee may have an interest in testifying on behalf of another employee where the co-employee's livelihood and/or reputation are at stake. *See Melton v. City of Oklahoma City*, 879 F.2d 706, 715 (10th Cir. 1989), *cert. denied*, __ U.S. __, 112 S. Ct. 297 (1991). However, the Tenth Circuit simply refused to accept that Workman's self-serving testimony at his own personnel grievance hearing was inherently a matter of public concern. 32 F.3d 483. Thus, rather than rejecting the Fifth Circuit's analysis in *Johnston*, the Tenth Circuit left open the possibility that it would follow *Johnston* when confronted with the appropriate facts. This case therefore does not present the Court with an appropriate opportunity for reviewing the correctness of the Fifth Circuit's test for protected speech.

II. THE DEVIATION BY THE FIFTH CIRCUIT FROM THIS COURT'S "PUBLIC CONCERN" REQUIREMENT DOES NOT JUSTIFY ISSUING THE WRIT OF CERTIORARI TO THE TENTH CIRCUIT.

The public interest in free and unhindered debate on matters of public interest is the core value of the Free Speech Clause of the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968). The First Amendment therefore embraces the liberty "to discuss publicly and truthfully all matters of public

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2. Although Workman's complaint sets forth the factual basis for two discreet claims of retaliation (Aplt. App. at Tab 10, p. 33, ¶¶ 85-90), the Tenth Circuit properly held that the first claim (which involved testimony by Workman at a co-employee's grievance hearing) was time-barred. *Workman, supra*, 32 F.3d at 482.

concern without previous restraint or fear of subsequent punishment." *Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940). Conversely, there are categories of speech to which the "majestic protection" of the First Amendment does not extend because they are "no essential part" of the marketplace of ideas. *Bose Corp. v. Consumers Union of the United States Inc.*, 466 U.S. 485, 504 (1984). Among these are statements made by public employees in their employment capacity which do not touch on matters of public concern. *Bose Corp., supra,* 466 U.S. at 505, n.22.

The function of the courts when confronted with the question of public employee speech is to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra,* 391 U.S. at 568; *see also, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 284 (1977) (same); *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979) (same); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (same); *Rankin v. McPherson,* 483 U.S. 378, 384 (1987) (same). The "threshold question" for the court's determination is whether the employee's speech addresses a matter of public concern. *Rankin, supra*, 483 U.S. at 384. If it does not, "it is unnecessary for [the court] to scrutinize the reasons" for the employment decision. *Connick, supra,* 461 U.S. at 146; *see also, Waters v. Churchill,* __ U.S. __, 114 S. Ct. 1878, 1887 (1994) ("... we have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern").

Petitioner seeks to eliminate this Court's "threshold question" for the determination of whether a public employee's speech is constitutionally protected. Relying primarily upon the Fifth Circuit's decision in *Johnston, supra*, petitioner would have this Court issue the writ of certiorari to the Tenth Circuit in order

to establish that testimonial speech at any employee grievance hearing is inherently a matter of public concern, no matter how trivial or personal the content of the speech. The Court should decline the invitation.

This Court has repeatedly refused to consider the form or content of the speech alone as determinative of its constitutional status. *Givhan, supra*, 439 U.S. at 415-416 (speech on matters of public concern does not lose protected status because it is delivered in private); *Connick, supra,* 461 U.S. at 148, n.8 (discussing *Givhan, supra*); *Rankin, supra,* 483 U.S. at 386, n.11 (discussing *Givhan*). Rather, in determining whether an employee's speech addresses a matter of public concern, the Court is to consider the "content, form *and* context of a given statement, as revealed by the *whole record.*" *Connick, supra,* 461 U.S. at 147-148 (emphasis added). As this Court explained quite clearly in *Connick*, the limitation of constitutional protection to speech on matters of public concern was not accidental:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern" was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.
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> * * *
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> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should

> enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> * * *
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> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 143, 146-147. Without this "common-sense" restriction to matters of public concern, the federal courts would be "swamped with routine employee grievances mischaracterized as First Amendment cases." *Connick, supra,* 461 U.S. at 165 (Brennan, Marshall, Blackmun and Stevens, J.J., dissenting).

Every federal circuit recognizes that subject matter of "public concern" is the "threshold" requirement in determining the constitutional status of employee speech. *O'Connor v. Steeves*, 994 F.2d 905, 912-913 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 634 (1993); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2nd Cir. 1993), *cert. denied*, __U.S. __, 114 S. Ct. 185 (1993); *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3rd Cir. 1983); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 77 (4th Cir. 1988); *Brawner v. City of Richardson*, 855 F.2d 187,191 (5th Cir. 1988); *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716, 720 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Gray v. Lacke*, 885 F.2d 399, 410 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990);

Smith v. Cleburne County Hospital, 870 F.2d 1375, 1381 (8th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989); *McKinley v. City of Eloy*, 705 F.2d 1110,1113-1114 (9th Cir. 1983); *Koch v. City of Hutchinson*, 847 F.2d 1436,1440 (10th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988); *Stough v. Gallagher*, 967 F.2d 1523,1527 (11th Cir. 1992). The circuits also generally recognize that if the employee's speech does not touch on a subject of public concern, the constitutional inquiry is at an end. *Czurlanis, supra*, 721 F.2d at 103; *Arvinger, supra*, 862 F.2d at 77; *Rice, supra*, 887 F.2d at 720; *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986). The circuits also recognize the reason for the restriction of constitutional protection to matters of public concern: a desire not to let government employees "constitutionalize" every employment decision. *See Arvinger, supra*, 862 F.2d at 78; *Rice, supra*, 887 F.2d at 720; *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 420 (7th Cir. 1988).

The decision of the Tenth Circuit below is directly in line with this Court's analysis as laid out from *Pickering* to *Rankin* and the majority of circuits applying this analysis. *Workman, supra*, 32 F.3d at 482-483. The Tenth Circuit properly noted that in order "To proceed with his First Amendment claim, Captain Workman must show the testimony he gave at his own grievance proceeding 'touches upon a matter of public concern'." 32 F.3d at 481. After considering the "content, form and context" of the speech at issue, "as revealed by the whole record," including Workman's motive for speaking, the Tenth Circuit properly concluded that Workman's speech "was clearly limited to his termination grievance and was not calculated to address concerns of the public." 32 F.3d at 482-483. Accordingly, the Tenth Circuit correctly found that Workman's speech did not rise to the level of constitutional protection. 32 F.3d at 483. Noting that "Captain Workman has not cited any cases holding that sworn testimony in an employee's own grievance proceeding is necessarily of a public concern," the Tenth Circuit rejected Workman's argument that the context alone of his speech elevated it to constitutional

status. *Id.* These conclusions by the Tenth Circuit followed naturally from an application of this Court's "public concern" requirement to Workman's speech.

In light of the widespread recognition and appreciation of the "public concern" requirement, this Court need not be overly alarmed by the Fifth Circuit's attempt in *Johnston* to widen the scope of protected speech. Disregarding the historical roots of the "public concern" requirement, the Fifth Circuit in *Johnston* held that "under certain circumstances . . . the *context* in which the employee speaks may be sufficient to elevate the speech to the level of public concern" and that "when an employee testifies before an official government adjudicatory or fact finding body he speaks in a *context* that is inherently of public concern." *Johnston, supra*, 869 F.2d at 1577-1578, emphasis added. Quite simply, the flaw in the Fifth Circuit's reasoning is that it elevates form (testimonial speech) over substance (content of public concern). If the employee is not speaking *on* a matter of public concern, the context *in which* he is speaking cannot transform his speech into a matter of public concern. The context in which the employee speaks may significantly affect the interest which the government as employer has in regulating that speech, but it should not affect the threshold determination of whether the subject matter upon which the employee speaks relates to an issue of public concern.

The majority of circuits to address this issue have expressly or implicitly rejected the Fifth Circuit's analysis. *Arvinger, supra*, 862 F.2d at 79; *Rice, supra*, 887 F.2d at 720-721; *Gray, supra*, 885 F.2d at 412-413 (involving the Petition Clause); *Ferrara, supra*, 781 F.2d at 1513-1514; *Yatvin, supra*, 840 F.2d at 419-420; *Curl v. Reavis*, 740 F.2d 1323, 1329, n.5 (4th Cir. 1984); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992). As explained by the Eleventh Circuit Court of Appeals in *Ferrara, supra*:

> The *Pickering* balance is not triggered unless

> it is first determined that the employee's speech is constitutionally protected. If the employee's speech does not relate to matters of public concern, then the employee has no First Amendment interest against which the employer's interest need be weighed.
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> * * *
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> Ferrara deems it relevant that he followed established procedures in airing his grievance, thereby avoiding any disruption in the operation of the school. Again, this is a factor to be weighed in the *Pickering* balance to determine whether the employer has infringed upon the employee's constitutionally protected right to freedom of speech. (citation omitted) It bears no relation to the issue of whether the speech is constitutionally protected.

781 F.2d at 1513-1514.

If Workman's testimony at a grievance hearing is automatically a matter of public concern (no matter how limited or personal), then all speech in connection with all litigation must also necessarily be a matter of public concern. This position receives a sound rebuke from the Seventh Circuit Court of Appeals in *Yatvin, supra*:

> Not every legal gesture — not every legal pleading — is protected by the First Amendment.
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> * * *
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> Necessarily, by filing suit in an area of

> debated legal principles, Yatvin raised issues of public significance; but the marketplace of ideas would not have been constricted, the vitality of public debate diminished, or the range of ideas and opinions in our society curtailed, if fear of retaliation had caused her to refrain from filing charges of sex discrimination.
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> * * *
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> Everyone exaggerates the importance of his or her own activity, and it is therefore natural for lawyers to suppose that every legal pleading, however, humble, comes trailing clouds of First Amendment glory. But this is an extreme position and we reject it. The vitality of the marketplace of ideas does not depend on the volume of litigation in the federal courts.

840 F.2d at 419-420; *see also, Altman v. Hurst*, 734 F.2d 1240, 1244, n.10 (7th Cir. 1984) ("Thus, a private office dispute cannot be constitutionalized merely by filing a legal action"), *cert. denied*, 469 U.S. 982 (1984). Although petitioner posits that the First Amendment protects the right to testify truthfully at trial, petitioner perhaps has forgotten that when a witness is placed under oath he has a *duty* — not a privilege — to speak the truth. *Ullman v. United States*, 350 U.S. 422, 439, n.15 (1956); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987).

Petitioner's request that this Court sanction all testimonial speech as inherently worthy of First Amendment protection is similar to efforts of other plaintiffs to seek special protection in the Petition Clause of the First Amendment. In an effort to evade this Court's public concern requirement, some plaintiffs have

argued that formal employee grievances are inherently a matter of public concern and therefore worthy of First Amendment protection under that amendment's guaranty of the right to petition for redress of grievances, because the speech is delivered in the form of a formal "grievance." The circuits which have addressed this issue — including the Fifth Circuit — have uniformly rejected this attempt to elevate form (grievance) over substance (the public concern requirement). *Renfroe v. Kirkpatrick*, 722 F.2d 714-715 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Day v. South Park Independent School Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101(1986); *Gray, supra*, 885 F.2d at 412-413; *see also, Schalk v. Gallemore*, 718 F. Supp. 862, 867-868 (D. Kan. 1989); *Santella v. Grishaber*, 654 F. Supp. 428, 435-436 (N.D. Ill. 1987).

Petitioner attempts to legitimize *Johnston* by citing decisions from various other courts purportedly following the *Johnston* analysis. In most of those cases, however, the speech in fact addressed matters of public concern. *See Ziccarelli v. Leake*, 767 F. Supp. 1450, 1454 (N.D. Ill. 1991) (testimony at death penalty hearing; "A contentious political and social debate has long surrounded the ultimate penalty"); *Green v. City of Montgomery*, 792 F. Supp. 1238, 1253 (M.D. Ala. 1992) (court declines to address the *Johnston* issue because "all of the officers whom the plaintiffs allege were retaliated against by Folmar or Wilson for testifying or participating in litigation against these defendants were clearly addressing issues of public concern"); *Freeman v. McKellar*, 795 F. Supp. 733, 736 (E.D. Pa. 1992) (testimony concerning misuse of funds for personal ends by city councilmen); *Czurlanis, supra*, 721 F.2d at 104 ("Information concerning the functioning of a segment of the county government is of considerable public importance, . . ."). *Reeves*, a decision by the Fifth Circuit, also involved speech on a matter of public concern, *see* 828 F.2d at 1100, as petitioner admits. (*See* Petition for A Writ of Certiorari at 12, hereafter, "Petition").

Interestingly, the district court in the *Johnston* case held that Mr. Johnston's speech was protected both by reason of its context and its content. *See Johnston, supra*, 869 F.2d at 1576. The testimony involved in *Johnston* was given at an equal employment opportunity hearing, 869 F.2d at 1568, 1578, and it has been held that speech regarding discrimination in employment is inherently a matter of public concern. *Patrick v. Miller,* 953 F.2d 1240, 1247 (10th Cir. 1992). It is also worth noting that the Fifth Circuit in *Johnston* attempts to rationalize its holding by reliance on this Court's decision in *Rankin,* commenting that the speech at issue in *Rankin* did not involve a matter of public concern. *Johnston, supra,* 869 F.2d at 1577. *Rankin,* however, involved speech which expressed a desire to assassinate the President of the United States, speech which this Court noted clearly related to a matter of obvious public concern. *Rankin, supra,* 483 U.S. at 386-388.

Petitioner decries the public employee who is discharged for testifying truthfully under oath at an employment grievance hearing, even though his speech was of purely personal content. Noting the injustice of suffering acts of discrimination in retaliation for truthful testimony, petitioner argues for automatic First Amendment protection — no matter how trivial or of limited interest is the content of the testimony. Respondents agree that acts of retaliation of any kind for offering truthful testimony should not be tolerated. The remedy, however, lies in the rejuvenated use of state courts, not the incessant use of federal courts.

The State of Colorado provides many legal remedies for retaliatory discharge and other acts of retaliatory employment discrimination. *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100, 104-110 (Colo. 1992); *Lathrop v. Entenmann's Inc.,* 770 P.2d 1367, 1372-1373 (Colo. App. 1989); Colorado Revised Statutes §§ 24-50.5-101, *et. seq.* (state "whistle-blower" statute). Petitioner is free to invoke these remedies, regardless of the

constitutional status of his speech. As the Seventh Circuit Court of Appeals explained in *Altman*:

> Despite our sympathy for plaintiff and our incredulity over some of the disciplinary measures imposed by defendants, we recognize that permitting him to maintain this action would open the federal flood gates to all manner of petty personnel disputes. Such disputes are best left to internal procedures established by employers and employees or, as here, where no such protection exists or where such procedures are inadequate, through state court adjudication.

734 F.2d at 1244; *see also, Curl, supra*, 740 F.2d at 1329, n.5 ("An employee's protection against being discharged in retaliation for filing E.E.O.C. charges, however, is not grounded in the Constitution but in Title VII. . . .").

Absent speech on a subject of public concern, a federal court is simply "not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick, supra*, 461 U.S. at 147. To set aside the limitation of speech on a matter of public concern would make of the First Amendment a "font of tort law," *see Paul v. Davis*, 424 U.S. 693, 701 (1976), which would flood the federal courts "with routine employee grievances mischaracterized as First Amendment cases." *Connick, supra*, 461 U.S. at 165. Accordingly, this Court should decline petitioner's invitation to issue the writ of certiorari to the Tenth Circuit to determine whether testimonial speech on matters of purely personal interest at an employee grievance hearing constitutes speech on a matter of public concern.

III. RESPONDENTS' CONDUCT IN ALLEGED RETALIATION FOR WORKMAN'S SPEECH AT HIS 1990 GRIEVANCE HEARING IS TOO INSUBSTANTIAL TO JUSTIFY CONSTITUTIONAL SCRUTINY IN FEDERAL COURT.

Petitioner alleges that respondents retaliated against him for testifying at his own grievance hearing in March of 1990. The alleged acts of retaliation for this speech consist of placing a performance evaluation and letter of reprimand in petitioner's personnel file and subjecting petitioner to a "re-entry plan." (Aplt. App. at Tab 10, pp. 23-24, ¶¶ 66.a-66.d). Following his 1990 grievance hearing, petitioner was reinstated to his former position in the Weld County Sheriff's Office and was awarded all back pay (Aplt. App. at Tab 10, p. 2, ¶ 2). He was not terminated, demoted or denied promotion. The alleged acts of retaliation for his 1990 grievance hearing testimony are too insubstantial to merit constitutional scrutiny.

It has long been settled that a state may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of speech. *Connick, supra*, 461 U.S. at 142. An employee's interest in speaking freely is constitutionally protected if the subject matter of his speech addresses an issue of public concern. *Connick, supra*, 461 U.S. at 143-146. The Constitution protects speech on issues of public concern because such speech occupies the "highest rung [in] the hierarchy of First Amendment values" and is essential to our system of self-government. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see also, Connick, supra*, 461 U.S. at 145. In order to protect this essential predicate for self-government, the First Amendment forbids government employer decisions which could "chill" an employee's interest in speaking out on matters of public concern. *Connick, supra*, 461 U.S. at 145.

Not surprisingly, *Pickering* and its progeny address government decisions involving employee dismissals or employment contract "non-renewals" because "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering, supra*, 391 U.S. at 574; *Rankin, supra*, 483 U.S. at 384. *See Pickering, supra*, 391 U.S. at 564, 574 (teacher dismissed); *Mt. Health School Dist. Bd. of Educ., supra*, 429 U.S. at 276, 283 (teaching contract not renewed); *Givhan, supra*, 439 U.S. at 411-412 (teaching contract not renewed); *Connick, supra*, 461 U.S. at 140, 141 (district attorney discharged); *Rankin, supra*, 483 U.S. at 379, 382 (clerical employee discharged); *Waters, supra*, 114 S. Ct. at 1883 (nurse discharged). This Court has also noted that constitutional principles forbid the government from withholding any substantial benefit on grounds which inhibit the exercise of constitutionally protected rights. *Perry v. Sindermann*, 408 U.S. at 593, 597 (1972).

Workman, however, was neither terminated, demoted, denied promotion nor denied any other governmental benefit in alleged retaliation for his speech at his 1990 grievance hearing. Rather, following his successful use of the Weld County grievance procedures, he was restored to his former position as captain in the Weld County Sheriff's Office and given an award of all back pay (Aplt. App. at Tab 10, p. 2, ¶ 2). The alleged acts of retaliation for his 1990 testimony upon which Workman focuses consist only of the placement of the letter of reprimand and performance appraisal in his personnel file and the development of a "re-entry plan" for him. As noted, the Tenth Circuit properly found that nothing in either the letter of reprimand or the performance appraisal was false. *Workman, supra*, 32 F.3d at 481. The placing of documents containing true statements in an employee's personnel file and the development of a "re-entry plan" do not rise to the level of conduct sufficient to justify constitutional scrutiny in federal court.

Workman alleges that the letter of reprimand and performance appraisal contain "demonstrably false allegations" and "false and scandalous material." (Pet. at 6, 7). He complains that the letter of reprimand, performance appraisal and re-entry plan memorialized the allegations precipitating his termination, which allegations he asserts were specifically found to be false. (Pet. at 6, 7). As explained in the Statement of Facts, however, the factual allegations underlying the charge of sexual harassment were never found to be false. Rather, the hearing officer found that although the allegations were grounded in fact, they did not "rise to the level of sexual harassment by any definition available to the Hearing Officer" and were consistent with what he perceived to be the overall atmosphere in the sheriff's office (Aplt. App. at Tab 1, p. 50). For example, the hearing officer found that Workman's conduct was "inappropriate" and that he did use "sexist, vulgar, inconsiderate and inappropriate [language] in the workplace." (*Id.* at 50). Even Workman has never denied that the specific instances of improper conduct did in fact occur. To the contrary, he implicitly concedes that they did occur. (*See id.* at 10, ¶ 44).

Contrary to Workman's allegations, the letter of reprimand does not state that Workman is guilty of sexual harassment. (*See* Pet. at 6, 7). Rather, the reprimand reiterates the hearing officer's specific finding that some of Workman's comments were "vulgar, sexist, inconsiderate and inappropriate in the work place" and that Workman employed terms such as "bimbo" and "bitch." (Aplt. App. at Tab 1, p. 67). A comparison of the letter of reprimand with the hearing officer's findings demonstrates that the matters contained in both are entirely consistent: the reprimand reiterates the findings of the hearing officer, including the determination that Workman's actions did not constitute sexual harassment (*Compare* Aplt. App. at Tab 1, pp. 48-54 with pp. 67-70). The "performance appraisal" contains less that can be characterized as true or false and more that is a matter of opinion regarding Workman's professional qualifications and general

conduct (*Id.* at 72-76). Contrary to Workman's arguments, the performance appraisal does *not* accuse Workman of sexual harassment (*See, id.* at 72-76). The performance appraisal merely reiterates the hearing officer's findings of "inappropriate" behavior and notes that Workman is responsible "to improve the climate." (*Id.* at 75).

The placing of documents containing true statements in an employee's personnel file and the development of a "re-entry plan" do not constitute "potent means of inhibiting speech." *Pickering, supra*, 391 U.S. at 574. These actions stand at the opposite end of the spectrum of personnel decisions from the dismissals and non-renewals involved in *Pickering* and its progeny. To hold that these alleged acts of retaliation merit constitutional scrutiny would "trivialize" the First Amendment in a "Pyrrhic victory." *Connick, supra*, 461 U.S. at 154; *Parratt v. Taylor*, 451 U.S. 527, 545 (1981) (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). To subject this type of conduct to constitutional scrutiny would be to extend an invitation for every "personnel decision taken by a public agency allegedly in reaction to the employee's behavior" to be reviewed in federal court. *Connick, supra*, 461 U.S. at 147. That would obviously run contrary to the "practical realities involved in the administration of a government office." *Connick, supra*, 461 U.S. at 154.

Accordingly, Workman's allegations of retaliation for testifying at his 1990 grievance hearing fail to show a constitutional violation, even if it is assumed that he spoke on matters of public concern. *See Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789, 1794 (1991) ("Siegert not only failed to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all").

Therefore, for this additional reason, the Court should decline Workman's request to issue a writ of certiorari to the Tenth Circuit to review that court's holding on Workman's First Amendment claim concerning various acts allegedly taken in retaliation for testimony at his 1990 grievance hearing.

IV. THE TENTH CIRCUIT PROPERLY FOUND WORKMAN'S FREE SPEECH CLAIM, TO THE EXTENT BASED UPON AN ALLEGED INCIDENT IN 1987, TO BE TIME-BARRED.

Although Workman's complaint sets out one claim for the alleged violation of his right to freedom of speech, this claim (as Workman explains in his petition) is based upon "two discreet, but very similar, violations" of his free speech rights (Aplt. App. at Tab 10, p. 33, ¶¶ 85-90; Pet. at 6). The first violation consists of an alleged act of retaliation for testimony Workman gave at a co-worker's grievance hearing in July of 1987, which retaliation allegedly injured Workman in July of 1987 and again in November of 1989. This will be referred to hereafter as the "first free speech claim." The second violation consists of alleged acts of retaliation for testimony Workman gave at his own grievance hearing in March of 1990. The Tenth Circuit properly found the first free speech claim to be time-barred. *Workman, supra*, 32 F.3d at 482.

When determining the appropriate statute of limitations to apply to a claim under 42 U.S.C. § 1983, such claims are best characterized as actions for personal injury. *Wilson v. Garcia*, 471 U.S. 261, 275-276 (1985). Federal courts therefore apply the state statute of limitations for personal injury actions when determining the timeliness of § 1983 claims. *Id.* In Colorado, that statute is Colo. Rev. Stats. § 13-80-102(1)(a) which provides a two year period of limitations for all tort actions. *Hunt v. Bennett*, 17 F.3d 1263, 1265-1266 (10th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 107 (1994). Workman does not dispute that the

Tenth Circuit applied the correct statute of limitations to his first free speech claim (Pet. at 8).

Although the federal courts must borrow the most appropriate state statute of limitations, the question of when a plaintiff's cause of action under § 1983 accrues for limitation purposes is governed by federal law. *Sandutch v. Muroski*, 684 F.2d 252, 254 (3rd Cir. 1982). A cause of action under § 1983 accrues when the plaintiff knows or has reason to know of the injury which forms the basis of his action. *Singleton v. City of New York*, 632 F.2d 185, 191 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). Workman implicitly concedes this principle (Pet. at 20).

Here, Workman knew of the injury (an allegedly negative performance review) which forms the basis of his first free speech claim when the review occurred in July of 1987. Because Workman did not sue for relief from that injury until he filed the complaint herein in November of 1990, the Tenth Circuit properly found this aspect of his free speech claim to be time-barred. *Workman, supra*, 32 F.3d at 482. Workman contends, however, that the Tenth Circuit misread his complaint. In particular, he contends that the first free speech claim set out in his complaint seeks damages for conduct taken in November of 1989 (his termination) which was based in substantial part upon the July 1987 negative performance appraisal. However, because Workman's termination in November of 1989 was allegedly based in substantial part upon the negative performance review of July 1987, and not upon Workman's speech at the July 1987 grievance hearing, Workman's complaint demonstrates that his termination in November of 1989 was merely a further manifestation of the injury he admits suffering in July of 1987.

According to Workman's complaint, in July of 1987 he testified adversely to the interests of Jordan and Dill at a co-employee's grievance hearing (Aplt. App. at Tab 10, p. 4, ¶ 17).

Within 24 hours of that hearing, Jordan and Dill imposed a "disciplinary suspension" upon Workman and ordered him to attend a previously unscheduled performance appraisal, at which Workman was given the first unsatisfactory performance review in his "lengthy employment history." (*Id.* at 4-5, ¶¶ 18-20; p. 33, ¶ 87) (*see also*, Pet. at 4, 22). More than two years later, in November of 1990, Jordan and Dill terminated Workman "in substantial part" due to his negative performance review in July of 1987 (Aplt. App. at Tab 10, p. 15, ¶ 53.h.6; p. 33, ¶ 88). As Workman explains in his complaint, the negative performance review of July 1987 "was adopted and served in part as the basis for the defendant's justification of plaintiff's termination in November of 1989." (Aplt. App. at Tab 10, p. 33, ¶ 88). Or, as he explains in his petition, "Respondents adopted the earlier *retaliatory act* and used *it* as a basis for terminating Workman's employment." (Pet. at 20, emphasis added). In neither his complaint nor his petition does he allege that his termination in November of 1989 was based in part upon his speech at the July 1987 grievance hearing.

Accepting the allegations of his complaint, Workman knew in July of 1987 that he had been retaliated against for speaking at his co-employee's grievance when he was subjected to a previously unscheduled performance review, placed on disciplinary suspension and given the first unsatisfactory performance review in his lengthy employment history (Aplt. App. at Tab 10, pp. 4-5, ¶¶ 17-20; p. 33, ¶¶ 86-87). Workman knew that he had been injured at that time, yet he did not file suit for over two years. The contents of his negative performance review therefore became final. As Workman admits, his subsequent termination in November of 1990 was based in part upon his then-final performance review from July of 1987, *not* upon his speech at the July 1987 grievance hearing (*Id.* at 15, ¶ 53.h.6; p. 33, ¶ 88). Thus, to the extent his termination in November of 1990 was based in part upon the July 1987 performance appraisal, the termination merely constituted a

further development of the previous injury of which Workman was already aware in July of 1987.

It is well established in Colorado (as elsewhere) that a cause of action accrues when the plaintiff is aware he has suffered some injury upon which a lawsuit could be brought, and that the plaintiff may not await the full development of his injuries before filing suit. *Doyle v. Linn*, 37 Colo. App. 214, 547 P.2d 257, 259 (1975); *Housing Authority v. Leo A. Daly Co.*, 35 Colo. App. 244, 533 P.2d 937 (1975); *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 158 N.W. 2d 580, 585 (1968); *Olson v. Bell Telephone Laboratories, Inc.*, 388 Mass. 171, 445 N.E. 2d 609, 610 (1983). Similarly, the "crucial time for accrual purposes" under § 1983 "is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action." *Singleton, supra,* 632 F.2d at 192. Workman was aware that he was suffering from an alleged wrong (unjustified disciplinary suspension and negative performance appraisal) for which damages may be recovered in a civil action under § 1983 when he received the allegedly unjustified disciplinary suspension and negative performance appraisal in July of 1987. Having not filed suit within two years of that known injury, his claim for an alleged violation of his right of free speech arising from that incident is time-barred, as the Tenth Circuit properly found. *Sandutch, supra*, 684 F.2d at 254 (" . . . he has alleged continuing ill-effects from preconviction acts"). Conversely, if Workman asserts that the disciplinary suspension and negative performance review alone did not constitute an injury upon which suit could have been brought, then he must also admit that the letter of reprimand and performance appraisal placed in his personnel file, and the development of the "re-entry plan" for him, following his own grievance in March of 1990, do not constitute sufficient injury to give rise to a First Amendment claim based upon the alleged incident in 1990.

Accordingly, this Court should also decline Workman's invitation to issue the writ of certiorari to the Tenth Circuit to review its holding with respect to the timeliness of Workman's first free speech claim.

CONCLUSION

Respondents respectfully request that this Court refuse to issue the writ of certiorari to the Tenth Circuit.

Respectfully submitted,

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No. 94-1112

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT WORKMAN,

Petitioner,

v.

SHERIFF ED JORDAN, in his individual capacity, and UNDERSHERIFF RICK DILL, in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY TO BRIEF IN OPPOSITION

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March 1995

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22 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

RESPONSE TO ARGUMENTS FIRST RAISED IN BRIEF IN OPPOSITION 1

CONCLUSION 6

APPENDIX "A" March 30, 1990 Findings of Fact, Conclusions and Decision of Hearing Officer In Workman's Grievance Appeal 1a

APPENDIX "B" Text of constitutional amendments and statutes involved 9a

TABLE OF AUTHORITIES

Cases

Cronk v. Intermountain Rural Elec. Co.,
765 P.2d 619 (Colo. App. 1988) 4

Holland v. Board of County Comm'r,
833 P.2d 500 (Colo. App. 1994) 5

Lathrop v. Entenmann's Inc.,
770 P.2d 1367 (Colo. App. 1989) 4

Martin Marietta Corp. v. Lorenz,
823 P.2d 100 (Colo. 1992) 4, 5

Constitutions

U.S. Const. amend. 1 . . . . . 1, 3, 5, 6

Statutes

Colo. Rev. Stat. § 24-10-106(1) 1, 5

Colo. Rev. Stat. § 24-50.5-101 . . . . . 1, 3

Colo. Rev. Stat. § 24-50.5-102 . . . . . 1, 4

Colo. Rev. Stat. § 24-50.5.103 . . . . . 1, 4

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REPLY TO BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution , 42 U.S.C. § 1983, and Colo. Rev. Stat. §§ 24-10-106(1); 24-50.5-101, -102, -103 are cited herein. *See* App. "B" for the text of these amendments and statutes.

RESPONSE TO ARGUMENTS FIRST RAISED IN BRIEF IN OPPOSITION

Initially, Petitioners wish to correct a misstatement in the Statement of Facts from Respondents' brief in opposition to the petition for a

writ of certiorari. In the middle of page 2 thereof, Respondents state that "the investigator" made certain factual findings with respect to the sexual harassment charges against Workman. Respondents then list ten findings allegedly made by the investigator.

In actuality, those "findings of fact" were made by two Weld County employees, Pat Persichino (Weld County Director of Personnel) and David Worden (the Acting Director of Personnel) "from the information obtained from [the investigator]." Aplt. App. 1 at 43. Thus, since the "findings" were made by two Weld County employees who cooperated closely with Respondents Sheriff Ed Jordan and Undersheriff Rick Dill throughout Weld County's biased investigation of the sexual harassment charges against Workman, the validity of the findings is very questionable.

Furthermore, the "finding" in Persichino's and Worden's November 7, 1989 memo of "unwelcome touches at the Sheriff's Office" is ambiguous in multiple respects. *See* Aplt. App. 1 at 43. For example, it only implies, but does not state, that Workman was responsible for the unwelcome touches. Thus, it leaves open the possibility that someone else engaged in the touching. Second, the memo does not indicate what type of touching occurred, other than pinching one woman on the cheek. Thus, the touching could have involved pats on the shoulder or something similar. By no means was there ever any evidence Workman touched any female employee in a sexual manner. In fact, the hearing officer specifically found that such conduct

did not occur. Aplt. App. 1 at 50 (App. "A", *infra* 3a-4a.)

It should also be pointed out that, contrary to Respondents' assertion on page 23 of the brief in opposition, the hearing officer made no finding that the sexual harassment allegations against Petitioner were grounded in fact. *See* Aplt. App. 1 at 48-54 (App. "A", *infra* 1a - 8a). Finally, Workman's complaint does not implicitly concede that the misconduct with which he was charged actually occurred. Because the hearing officer had already concluded there was no evidentiary basis for the sexual harassment charge, Workman's federal court complaint did not address that issue. Rather, the complaint dealt with Respondents' misconduct in violating Workman's constitutional and state law rights.

On a second issue, Respondents argue on pages 19-20 of the brief in opposition that it is unnecessary for this Court to provide First Amendment protection for government employees who provide sworn, truthful testimony on the basis that there are allegedly various state law protections available to persons such as the Petitioner. However, there are a number of fallacies in this argument.

As Respondents are well aware, Colo. Rev. Stat. § 24-50.5-101, *et seq.* (the state "whistle-blower" statutes) (App. "B", *infra* 11a-13a) are not available to Workman. Those statutes provide protection from employer retaliation only for persons employed by a state agency. *See* Colo. Rev. Stat. §

24-50.5-102(3). Workman, on the other hand, was employed by a county government. In an attempt to utilize the "whistle-blower" statutes, Petitioner alleged, as a seventh claim for relief, a claim based upon § 24-50.5-103. Respondents moved to dismiss the claim on the ground that Petitioner was not an employee of the state of Colorado (Aplt. App. 2 at 13), and the district court dismissed the claim. Aplt. App. 4. Thus, there is no basis for Respondents to contend that Workman could invoke the state whistle-blower statutes to protect him from their retaliatory conduct in this matter.

Furthermore, the case law established under *Martin Marietta Corp. v. Lorenz*, 823 P. 2d 100 (Colo. 1992) and *Lathrop v. Entenmann's Inc.*, 770 P.2d 1367 (Colo. App. 1989) is probably inapplicable to the instant situation. In Colorado, an employee may generally be terminated at the will of the employer. *Cronk v. Intermountain Rural Elec. Co.*, 765 P.2d 619, 622 (Colo. App. 1988). In *Lorenz*, however, the Colorado Supreme Court established a public policy exception to the state's at-will termination rule. Under *Lorenz*, an employee cannot be terminated where: (a) the employer directs the employee to perform an illegal act as part of his work related duties or prohibits the employee from performing a public duty or exercising an important job right; (b) the action directed by the employee would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy; (c) the employee was terminated for refusing to follow the employer's directive; and (d) the employer knew, or should have

known, that the employee's refusal was based upon his reasonable belief that the order was illegal. *Lorenz*, 823 P.2d at 109.

Here, the public policy exception is probably inapplicable since the Respondents did not direct Petitioner to perform an illegal act or prohibit him from performing a public duty. Additionally, the exception apparently would not apply to the retaliation for Petitioner's speech at his own grievance board hearing because that retaliation consisted of acts other than termination. Moreover, a claim based upon the public policy exception could not be brought against a governmental entity in Colorado on the ground that, as a tort claim, it would be precluded by the Colorado Governmental Immunity Act. *See* Colo. Rev. Stat. § 24-10-106(1) (App. "B", *infra* 9a-11a); *Holland v. Board of County Comm'r*, 833 P.2d 500, 508 (Colo. App. 1994). Thus, the state laws cited by Respondents are of little, if any, value to Workman.

Yet, even if the state laws cited by Respondents had been available to Workman, the Court should nonetheless make it clear that the First Amendment protects government employees providing sworn, truthful testimony from employer retaliation. In the first place, the laws cited by the Respondents would be available only to Colorado residents; whereas all government employees, regardless of their state of residency, should be immune from such employer retaliation. Second, state laws can be repealed or overruled. Third, because testimonial speech is of fundamental importance to our judicial system, it deserves constitutional protection.

Accordingly, the Court should hold that a governmental employee's sworn, truthful testimony at a quasi-judicial, administrative hearing is inherently a matter of public concern subject to the protection of the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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March 1995

APPENDIX "A"

WELD COUNTY ADMINISTRATIVE APPEAL

GRIEVANCE HEARING OF ROBERT WORKMAN BEFORE WELD COUNTY HEARING OFFICER DON J. HOFF

FINDINGS OF FACT, CONCLUSIONS AND DECISION

THIS MATTER, came on for hearing on March 6th, 1989 and was continued from time to time for the taking of testimony and making argument and the hearing was finally concluded and closed by the Hearing Officer on March 23rd, 1989. Sheriff Ed Jordan, appeared in person and by his attorneys Jan Rundus and Bruce T. Barker. The employee, Robert Workman, appeared in person and by his attorney Mark [sic] Colin. Numerous witnesses testified and twenty-six (26) exhibits were marked and admitted into evidence. One exhibit admitted into evidence was not marked, but consisted of a transcript of an interview between Captain Paul Branham and Susan Jarrett. A notebook containing the transcript of interviews between Captain Branham and other employees of the Sheriff's office and also containing numerous other documents was made available to the Hearing Officer by stipulation of the parties.

After hearing the evidence, the statements of counsel and reviewing the exhibits, the Hearing Officer enters the following findings:

A. While Colorado Law generally allows an employer to terminate an employee at will, unless the employee has certain vested rights or contractual rights associated with his employment, the County, and thereby Sheriff Jordan, granted to his employees certain rights to their employment, specifically setting limits on when and how an employee can be terminated and those rights are set forth in Ordinance No. 118-G adopted by the Board of Commissioners, Weld County, Colorado.

B. Ordinance No. 118-G allows the employer to terminate an employee for severe misconduct pursuant to the Dismissal Procedures section on page 15 of the Ordinance. An employee may also be terminated after being convicted of a crime, pursuant to page 21 of the Ordinance. It is clear that both of those terminations may be made without the application of progressive discipline.

C. An employee may be terminated for sexual harassment pursuant to pursuant to [sic] page 13 of the Ordinance. However, it is unclear to the Hearing Officer, whether such termination must be preceded by progressive discipline. Any other terminations, including those listed on page 14 of the Ordinance, must be preceded by attempts at progressive discipline.

D. Page 15 of the Ordinance contains a section entitled Disciplinary Action, which lists the types of disciplinary actions which an employer can impose upon an employee. The section on dismissal procedures in part states,

> "Dismissal should be considered only after all attempts at progressive discipline (e.g. verbal counseling, written counseling, suspension, special review period, etc.) have failed. The exceptions to progressive discipline are incidents of severe misconduct. No dismissal shall be made unless and until the employee is given a pre-dismissal hearing."

E. Sheriff Jordan did not allege and did not prove that Captain Workman's action constituted severe misconduct.

F. Some of Captain Workman's comments were vulgar, sexist, inconsiderate and inappropriate in the workplace, but did not contain sexual innuendos or seek sexual favors, as are normally required by case law to prove a case under Title VII of the Civil Rights Act of 1964 or to prove a violation of the Federal Equal Employment Opportunity Commissions' guidelines on discrimination because of sex, 29 C.F.R. Section 1604.11. The Statute has been cited by both parties and the C.F.R. regulation contains the same language as the County Personnel Policy.

G. Captain Workman's actions did not rise to the level of sexual harassment by any definition

available to the Hearing Officer. Captain Workman's actions did not include unwelcome sexual advances, requests for sexual favors or constitute verbal or physical behavior of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance or create an intimating, hostile or offensive work environment. Any effect Captain Workman's actions may have had on any female employee's work performance was not substantial and did not of itself, create an intimating, hostile, or offensive work environment. His actions, although they may have been inappropriate, were not inconsistent with the actions and telling of stories or jokes containing sexual innuendos of numerous other employees of the agency, which apparently are tolerated by the agency, as there is no evidence in the record to reflect any efforts made to curb such activity.

H. The Sheriff argues that because Workman was a high ranking official, he either knew or should have known that he was not being sufficiently supportive of the Sheriff and that he was engaging in improper conduct without being told that he was engaging in improper conduct. This argument, under certain circumstances may have merit, however, Ordinance No. 118-G, specifically the section involving exempt positions on page 13, does exempt certain employees and could have easily exempted Captains in the Sheriff's Department. Since the Ordinance specifically does exempt certain employees and does not exempt the remainder of the employees, the Ordinance must be followed as closely as possible in terminating employees and that includes

complying with the Ordinance's requirements of progressive discipline.

I. Captain Workman's evaluations throughout his fourteen year career with the Sheriff's office have always rated him as meeting or exceeding the standard, except during one evaluation period approximately two and one-half years prior to the termination. The activity that caused the termination was not reasonably related to the activity which resulted in the poor evaluation in the period covering the first half of 1987. (Note: Text may be missing from Hearing Officer's Findings of Fact, Conclusions and Decision) he [sic] was not managing his department in accordance with the Sheriff's desires, but he was never given specific instructions on how to modify his behavior and how to come into compliance with the policies or management style of the Sheriff.

THE HEARING OFFICER THEREFORE, makes the following conclusions:

A. The information provided by Captain Branham, to the Sheriff and the personnel department, was insufficient to sustain a charge of sexual harassment.

B. Given the rather common practice of telling jokes involving sexual innuendos, the use of terms such as "bitch" or "bimbo" or other vulgar language within the agency and with no effort to halt such activity, the actions of Captain Workman could not be considered deliberate, offensive language or

conduct toward the public or fellow employees, which would warrant termination.

C. Ordinance No. 118-G, except in cases of the commission of a crime, extreme misconduct, and sexual harassment, states that an employee must be given notice of his deficiencies or improper actions through progressive forms of discipline, prior to being terminated.

D. The Sheriff, through the Weld County Commissioners and Ordinance No. 118-G, has established policies and procedures for terminating an employee, specifically the imposition of progressive discipline prior to terminating an employee and the Sheriff did not follow those policies in regard to Captain Workman's termination.

E. An employee, charged with incompetence or inefficiency, must be specifically advised of the action or inaction which his employer believes reflect incompetence or are inefficient and the employee must be given an opportunity to correct his incompetent or inefficient acts when a policy such as Ordinance 118-G is in effect. Captain Workman was never advised either orally or in writing that any act or inaction on his part could be considered incompetent or inefficient. Captain Workman, to the contrary, was given good evaluations by the agency throughout his fourteen year career with the Sheriff's office, except during one six month period. In addition, when an employee must be given notice of his poor performance, it must be given in a timely manner, so that the employee can correct his actions

prior to being terminated. A discipline imposed two and one-half years prior to a termination, cannot be used as the basis for a termination, particularly when that discipline was not reasonably related to the acts causing the termination.

F. The first paragraph of the dismissal procedures of Ordinance 118-G states, "Dismissal should be considered only after all attempts at progressive discipline, (e.g. verbal counselling, written counselling, suspension, special review period, etc.) have failed." This requires that except in cases of severe misconduct, conviction of a crime and sexual harassment, an employee must before termination, receive at least two forms of progressive discipline (because attempts is plural) prior to termination. Because of the language of the Ordinance, it may require that all forms of discipline be used prior to termination, specifically verbal counselling, written counselling, suspension with our without pay, special review period and demotion, must have been attempted and failed prior to the termination of an employee.

G. Since the charges against Captain Workman for sexual harassment cannot be sustained and since he is not charged with severe misconduct and even if he were charged with severe misconduct, it could not be sustained and since he is not charged with conviction of a crime, he cannot be terminated until at least some attempts at progressive discipline have been made and failed.

IT IS THEREFORE THE DECISION OF THE HEARING OFFICER THAT; the grievance is sustained and the termination is reversed.

DATED this 30th day of March, 1990.

Don J. Hoff, Hearing Officer

APPENDIX "B"

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

§ 24-10-106. Immunity and partial waiver. (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:

(a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of his employment, except emergency vehicles operating within the provisions of section 42-4-106(2) and (3), C.R.S.:

(b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity;

(c) A dangerous condition of any public building;

(d) A dangerous condition of a public highway, road, or street which physically interferes

with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof, but shall include the failure to repair a stop sign or a yield sign which reassigned the right-of-way or the failure to repair a traffic control signal on which conflicting directions are displayed, if such failure constituted a dangerous condition as defined in section 24-10-103(1).

(e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity or public water, gas, sanitation, electrical, power, or swimming facility. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or on a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility,

electrical facility, power facility, or swimming facility by such public entity.

(2) Nothing in this section or in section 24-10-104 shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.

(3) In addition to the immunity provided in subsection (1) of this section, a public entity shall also have the same immunity as a public employee for any act or failure to act for which a public employee would be or heretofore has been personally immune from liability.

(4) No rule of law imposing absolute or strict liability shall be applied in any action against a public entity or a public employee for an injury resulting from a dangerous condition of, or the operation and maintenance of, a public water facility or public sanitation facility. No liability shall be imposed in any such action unless negligence is proven.

§ 24-50.5-101. Legislative declaration. The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in government authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to

provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official.

§ 24-50.5-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Disciplinary action" means any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.

(2) "Disclosure of information" means the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.

(3) "Employee" means any person employed by a state agency.

(4) "State agency" means any board, commission, department, division, section, or other agency of the executive, legislative, or judicial branch

of state government.

(5) "Supervisor" means any board, commission, department head, division head, or other person who supervises or is responsible for the work of one or more employees.

§24-50.5-103. Retaliation prohibited. (1) Except as provided in subsection (2) of this section, no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information. This section shall not apply to:

(a) An employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof;

(b) An employee who discloses information from public records which are closed to public inspection pursuant to section 24-72-204;

(c) An employee who discloses information which is confidential under any other provision of law.

(2) It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure.